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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC, INC. and S.A.M. INDUSTRIES, INC., *Petitioners,*

VS.

GTE SYLVANIA INCORPORATED, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioners, Continental T.V., Inc., A & G Sales, Sylpac, Inc. and S. A. M. Industries, Inc. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 9, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is not yet reported. The District Court wrote no

opinion. It entered Findings of Fact and Conclusions of Law (Appendix B, pp. 115-29) which are not reported.

JURISDICTION

The Court of Appeals entered judgment on April 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

If a TV manufacturer selling direct to retail dealers restricted intrabrand competition by assigning to each dealer a territory in which alone it could resell, the arrangement would blatantly violate the per se rule of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The questions presented here are:

1) Can such a manufacturer evade the *Schwinn* rule by assigning to each dealer not a territory but a store location from which alone it can resell, when the manufacturer's stated purpose is to eliminate intrabrand competition and the effect is to exclude one dealer from competing in the territory served by another?

2) Even though *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) and *United States v. Arnold, Schwinn & Co., supra,* establish that claimed benefits to interbrand competition cannot excuse horizontal or vertical territorial restrictions which foreclose intrabrand competition, must a trial judge

or jury attempt under the rule of reason to weigh asserted benefits to interbrand competition against foreclosure of intrabrand competition merely because the manufacturer has changed the form by which intrabrand competition is eliminated from a restraint on the territory within which dealers can resell to a restraint upon the store locations from which dealers can resell?

3) Even if it were assumed, contrary to the teaching of *Topco* and *Schwinn,* that a judge or jury could properly decide to sacrifice intrabrand competition upon credible economic evidence that increases in interbrand competition would be attained thereby, should they be compelled to speculate about a possible benefit to interbrand competition and its relative weight when the only economic evidence shows that in the present state of economic knowledge it is impossible to tell whether a restraint upon intrabrand competition has resulted in any benefit to interbrand competition?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable constitutional and statutory materials are set out in Appendix C, pp. 130-33.

STATEMENT OF THE CASE

Proceedings in the District Court

When GTE Sylvania Incorporated ("Sylvania") sued petitioners, corporations in substantially common ownership operating a chain of retail TV stores in

California ("Continental"), for money due for TV sets sold and delivered, Continental counterclaimed seeking treble damages and injunctive relief under the antitrust laws. The case on the counterclaim was tried to a jury before Mr. Justice Tom C. Clark sitting by designation in the district court. The jury found for Continental in the form of answers to special interrogatories and Mr. Justice Clark made findings of fact favorable to Continental and granted injunctive relief. The trial court's findings and the evidence supporting the jury's verdict show the following facts:

In 1962 Sylvania abandoned its earlier practice of selling TV sets manufactured by it to wholesalers who resold without restriction. It initiated instead what it called its "elbow room" plan. (App. A pp. 3-6) Under this plan Sylvania sold only to selected retailers. These retailers undertook to resell only at designated store locations approved in advance by Sylvania. (App. A pp. 5-6) There was abundant evidence that Sylvania's purpose was precisely the same purpose which motivated the territorial restraints in *Schwinn*. Thus, Sylvania's sales manual said the restraints would create "'elbow room' in a sensible territory . . . ." and that "'same brand' competition is eliminated." (App. A p. 66)[1] At the time it initiated these restraints Sylvania held between

[1]Sylvania's sales manual which was introduced into evidence in the district court also stated that the elbow room plan "gives every Sylvania dealer a geographic area in which to sell . . . ," and that Sylvania "franchise[s] dealers by territory . . . ." (See Findings of Fact, ¶ 7, App. B pp. 119-20)

one and two percent of the TV market nationally. (App. A p. 3) Though Sylvania introduced not a shred of evidence that its pre-1963 TV operations were not profitable, the evidence is clear that Sylvania, like Schwinn, wanted a bigger market share. It introduced the "elbow room" restrictions (along with product, advertising and managerial changes) in the hope of increasing its share. (App. A pp. 2-3, footnote 2)

Continental, a family business with eight retail stores in northern California, was one of Sylvania's largest customers. From the inception of its relationship with Sylvania until 1965, it complied with the elbow room restraints. (App. A pp. 6-9) In 1965 Continental, which had stores in Oakland, San Francisco, and San Jose, decided to open a store in Sacramento, California. (App. A p. 9) Although before 1963 Sylvania had sold to several retailers in Sacramento, under the "elbow room" program there was only one retailer in Sacramento which handled Sylvania merchandise in volume; that retailer, Handy Andy, was the only firm in Sacramento making retail sales of Sylvania color TV sets and also accounted for 80% of the sales of black and white sets. When Continental took steps to enter the Sacramento market, Handy Andy complained to Sylvania. (App. A pp. 54-55, footnote 1) Sylvania thereupon denied permission to Continental to ship any of Continental's Sylvania-brand merchandise to the new Sacramento store or to sell Sylvania-brand merchandise there. Indeed, Sylvania threatened dire conse-

quences if Continental displayed or sold Sylvania products in Sacramento. (App. A pp. 54-55, footnote 1) (Findings of Fact ¶¶ 11-13, App. B pp. 122-23)

Despite Sylvania's threats, Continental, after consultation with counsel, moved Sylvania-brand TV sets owned by Continental, from its San Jose warehouse to its Sacramento store for resale. Sylvania took retaliatory steps which injured Continental's credit, deprived it of sources of merchandise, drove it out of Sacramento and, ultimately, out of several other markets as well. (App. A pp. 54-55, 56-57) (Findings of Fact ¶ 14, App. B pp. 123-24)

As Sylvania has insisted throughout, given the form of Sylvania's elbow room restriction, Continental theoretically could make resales to Sacramento buyers without technically violating the restriction by making such sales from its San Francisco or Oakland stores. But witnesses for both parties all testified that a TV retailer cannot as a practical matter make sales to customers more than 25 to 50 miles away from its store; and Continental's nearest stores were well beyond this range in the entirely different San Francisco and [redacted] retail markets. (App. A pp. 67-68) Thus, the unquestioned thrust of Sylvania's action was exclusion of Continental from competing with Handy Andy in Sacramento. (Finding of Fact, ¶¶ 8, 16, App. B pp. 120, 126)

The case was presented to the jury by Continental on the theory that in purpose and effect Sylvania imposed a territorial restriction in violation of the per se rule of *United States v. Arnold, Schwinn & Co., supra.* (App. A p. 60, footnote 1b) Sylvania asserted the factual defense that it did not retaliate against Continental for entering Sacramento but took the steps it did for credit reasons. (Finding of Fact ¶ 15, App. B pp. 124-25) It also contended that the true character of its elbow room program was merely to franchise by location and that it did not control dealer resale territories. (App. A pp. 60-61, footnote 1c) Mr. Justice Clark left these factual issues to the jury. He instructed them that [redacted] claimed that the elbow room restrictions constituted a contract combination or conspiracy "the purpose and effect of which was to establish and enforce a distribution policy restricting the locations from which and territories in which Sylvania dealers could resell . . . ." He then accurately paraphrased the language and holding of *U.S. v. Arnold, Schwinn & Co., supra,* saying:

> ". . . [w]here a manufacturer . . . restricts the territories with which a dealer may resell merchandise purchased from the manufacturer, such a restriction is unlawful regardless of whether or not the restriction is good business practice from the manufacturer's point of view and is likely to assure adequate volume or profits. Any agreement, combination or conspiracy by which a manfacturer interferes with the ordinary and usual forces of competition to restrict [redacted] territories within which they have purchased from the manufacturer or to keep one dealer from competing for customers or sales in a territory or area served by another dealer also constitutes a violation of the antitrust laws, whether or not the

territories resulting seem reasonable or unreasonable.

Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion or control over the products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they purchased from Sylvania to be a violation of Section 1 of the Sherman Act, regardless of the reasonableness of the location restrictions." (App. A p. 59, footnote 1a)

He then went on to instruct the jury in the terms requested by Sylvania that a manufacturer *does* have the right to franchise by location and to refuse to franchise at additional locations, and *does* have the right to select its own customers and to grant exclusive dealerships. In short, it was only a contract, combination or conspiracy which in purpose and effect restricted where or to whom a dealer might resell which the court told the jury would constitute a violation.

The jury in answers to special interrogatories found that Sylvania's resale restrictions constituted a contract, combination, or conspiracy in restraint of trade in violation of the antitrust laws and that Continental sustained damage to its business or property as a proximate result. (App. A pp. 11-12, footnote 6) Mr. Justice Clark then made findings of fact to the

same effect as a predicate to injunctive relief. These findings, Appendix B pp. 116-26, like the jury verdict, rejected Sylvania's factual claim that it acted against Continental not because Continental sold TV sets in Sacramento but because of doubts about Continental's credit; the trial judge found that Sylvania acted, in purpose and effect, to keep Continental from competing in Sacramento. (Findings of Fact ¶¶ 14, 15, 16, App. B pp. 123-26)

Proceedings in the Court of Appeals

The judgment entered for Continental in the district court was affirmed, two to one, by a three-judge panel in the court of appeals. Rehearing en banc was granted and the panel opinion withdrawn. A sharply divided court of appeals ultimately reversed the district court by a seven to four vote. The majority, in a lengthy opinion by Judge Ely (App. A pp. 1-54), held that "the legality of the locations clauses here involved should be judged under what is commonly referred to as the 'rule of reason', rather than a rule of *per se* illegality." (App. A p. 17) The majority distinguished *Schwinn* on the ground that "Schwinn's territorial restrictions . . . prevented a dealer from competing for customers outside his territory," whereas "Sylvania's dealers could sell to customers from any area, could advertise in any area, and were limited only as to the location of the franchisee's place of business." (App. A pp. 20-21) The majority found in some lower court cases a basis for doubting whether this Court was, in *Schwinn,* "establishing a per se rule against all vertical territorial restraints"

(App. A p. 33). It criticized the trial judge because he "chose to apply, literally, the . . . sweeping language" of *Schwinn* (App. A pp. 17-18). Perceiving a distinction between the restraints in *Schwinn* which restricted resale territories and those used by Sylvania which restricted the store location where resales could be made, the majority held that it was wrong to instruct in terms of *Schwinn* despite the abundant evidence of a purpose and effect to exclude Continental from Handy Andy's protected Sacramento territory. The majority limited *Schwinn's* application to territorial restraints which "absolutely prohibited a dealer from selling to purchasers outside of a certain area." (App. A p. 24) Even on facts like those here, the *Schwinn* rule, it held, must be kept secret from the jury. The court below thus entered its order reversing and remanding the case for further proceedings not inconsistent with the majority opinion. (App. A pp. 53-54)

Judges Kilkenny, Browning, Duniway and Wright dissented from that disposition and opinion. Judge Kilkenny's opinion (App. A pp. 54-86), concurred in by Judges Browning and Wright and in this part by Judge Duniway called the factual distinctions from *Schwinn* "insignificant" and stated that the district court "simply took the holding of *Schwinn* at face value and applied it to a set of facts which it logically encompasses." (App. A p. 65) It labelled the majoritys' views as "impossible to reconcile with the jury verdict and the district court's findings of fact, which establish that the location clause operated

as a territorial restraint". (App. A p. 66) It read *Schwinn* to "outlaw any and all territorial restrictions on resale to others" and thus as rendering illegal "all devices, the inevitable practical effect of which is to restrict a retailer's territory." (App. A p. 68) Judge Browning also wrote a lengthy opinion showing that major purposes of the Sherman Act would be frustrated by the majority position. (App. A pp. 87-113) Judge Duniway wrote a brief opinion putting his dissent solely on the ground that *Schwinn* controls this case. (App. A p. 114) Chief Judge Chambers wrote a brief opinion concurring in the judgment of the majority but dissenting from the number of words used to reach it and criticizing the majority for relying on law review comments about this very case. (App. A pp. 86-87)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS A TRANSPARENT EVASION OF CONTROLLING DECISIONS BY THIS COURT

Resolving earlier doubt expressed in *White Motor Co. v. United States,* 372 U.S. 253 (1963), and over pointed dissent, this Court in *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967) deliberately adopted a rule of per se illegality to govern vertical restraints imposed by a manufacturer limiting the persons to whom or places at which a wholesaler or retailer may resell:

> "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an arti-

> cle may be traded after the manufacturer has parted with dominion over it . . . . Such restraints are so obviously destructive of competition that their mere existence is enough." (388 U.S. at 379)

The important policies which underlie this rule all require that the *Schwinn* holding be applied to all fact situations which in reason it governs and that *Schwinn* not be reduced to a technicality which can be evaded by trivial changes in the form of a resale restraint. In whatever guise they appear, vertical resale restraints which effectively segregate resellers into separate geographic markets (as do both the *Schwinn* and the Sylvania restraints) deprive consumers of the benefits of same-brand competition. The maverick dealer whose actual or potential entry would otherwise put a protected dealer on his mettle is effectively thwarted. A protected dealer like Handy Andy is freed from intrabrand price competition just as effectively as if the manufacturer had fixed resale prices; in addition, he is freed from such competition as an entering dealer like Continental might offer in the way of attractive facilities and services. Moreover, when restraints like these are used, decisions about the deployment of distribution resources are made at the "macro" level by the manufacturer. See *Northern Pacific Railroad Co. v. United States,* 356 U.S. 1, 4 (1958). Often (as in this instance, where Sylvania's protected Sacramento dealer complained to Sylvania) the manufacturer will be acting merely as the surrogate for dealers or distributors who welcome the benefits of what constitutes, in effect, a cartel. Cf. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911); Bowman, *The Prerequisite and Effects of Resale Price Maintenance,* 22 UNIV. CHI. L. REV. 825 (1955). But even if the initiative comes entirely from the manufacturer, consumers are deprived of the more flexible judgments about resource allocation which could be expected if decisions were made on a "micro" basis by numerous individual dealers and distributors, each intent on his own best interest. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* supra at 409. None of these harmful effects turn on whether the restraint is in the precise form of the *Schwinn* restraint or in a somewhat different form, like the Sylvania restraint. They turn solely on the effect of the restraint—that one dealer is kept from selling in the same general area and to the same customers as the other.

Nor are economic interests the only ones at stake. The Sylvania restraints, just as surely as the *Schwinn* restraints, offend a vital social goal of the Sherman Act. Both deprive independent retailers of power to act for themselves, free of coercion, collusion and exclusionary impediments, in making the most crucial and important decisions any independent trader can make. This Court has often stressed the Sherman Act goal of commercial freedom. *United States v. A. Schrader's Sons, Inc.,* 252 U.S. 85, 100 (1920); *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4-5 (1958); *Brown Shoe Co. v. United States,* 370 U.S. 294, 344 (1962); *Simpson v. Union Oil Co.,* 377 U.S. 13, 19 (1964). Recent scholarship reconfirms that Congress, too, regarded it as important. Bohling,

Franchise Terminations Under the Sherman Act: Populism and Relational Power, 53 TEXAS L. REV. 1180, 1189 (1975). Judge Browning's dissent below presses this point forcefully. (App. A pp. 88-90)

Finally, to apply the rule of reason in a case where resellers, by any device, are precluded from competing with each other in the same resale market would be to run roughshod over this Court's settled view about the alternative roles of the judiciary and the legislature in anti-trust administration. The interests which the Court has had in mind when it has addressed these matters of legal process are related to the purpose and effect of a restraint, not to its mere form. A per se rule ". . . avoids the necessity for an incredibly complicated and prolonged economic investigation . . . —an inquiry so often wholly fruitless when undertaken." *Northern Pacific Railway v. United States, supra* at 5. That difficult inquiry cannot be avoided when, absent such an inquiry, it is not possible to tell whether or not competition has been injured at all. But as this Court recently held in *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972), where, as here, a restraint has been imposed on intrabrand competition, the Court should not set sail on a sea of speculation in a prophetic effort to tell whether the resulting injury is offset by asserted benefits to interbrand competition:

> "Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules . . ." (405 U.S. at 609-610)
>
> ". . .

> ". . . If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this . . . is a decision that must be made by Congress and not by private forces or by the courts." (405 U.S. at 611).[2]

While the view expressed in *Topco* is not aimed primarily at the problem of court congestion, it is obviously relevant also to that problem. Tried under the per se rule, this case was numerous months at the discovery and motion stage, many weeks at trial, and five years in the court of appeals. Under a rule of reason standard vastly more private and judicial resources would have to be expended on a case such as this. The per se rule also has another collateral advantage. By pointing the jury to the explicit and manageable question whether resale restrictions were imposed, it reduces the jury's range of untrammeled discretion. The inevitable risks of ethnic, social, regional, racial, anti-corporate or other invidious discriminations are markedly reduced.

Despite this Court's holdings in *Schwinn* and *Topco,* and with apparent disdain for the policies underlying them, the majority below held that *Schwinn* has no

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[2]It was recently reported that the House Commerce Committee approved a bill (H.R. 6684) which provides that trademark licensing agreements limiting the geographical territory in which a franchise holder can process and sell certain private-label food products and soft drinks shall not be deemed per se violations of the antitrust laws. See 766 *Antitrust & Trade Reg. Rep.* A-14 (June 1, 1976). Whatever the fate of this particular legislation, which would leave *Schwinn* applicable in full force to the TV industry, it is obvious that Congress can deal with the issues left to it by *Topco* selectively on an industry by industry basis in a way which, as *Topco* makes clear, is not feasible for the Court.

application to Sylvania's resale restraint because, given the form of Sylvania's restraint, Continental retained a right to resell in Sacramento from its retail TV store in San Francisco or Oakland—a right which was wholly theoretical, and of no more practical consequence than Continental's equally theoretical and wholly useless right to sell, say, in New York City, by advertising in the New York Times in the hope of attracting phone or mail orders to be filled by deliveries from San Francisco. In short, the majority below embraced a factual basis for distinguishing *Schwinn* which is a transparent farce. If allowed to stand, that decision will belie any claim that antitrust jurisprudence is rooted in principles of general application. If the decision below is sound, then the rule of *Schwinn* has been successfully laid to rest by an intermediate appellate court, except in so far as the *Schwinn* rule may remain a hazard for the naive trader who does not avail himself of the simple measures which, according to the Ninth Circuit majority, may be used to evade *Schwinn*.

The reasons given by the majority below for its scornful treatment of *Schwinn* compound the incongruity. For one thing, the majority relies on cases which plainly lack relevance. *Salco Corp. v. General Motors Corp.*, 517 F.2d 567 (10th Cir. 1975), for example, holds only that it is lawful for a manufacturer to specify the location covered by a franchise given to a dealer. Of course it is. A manufacturer need not permit a dealer to hold itself out as the manufacturer's authorized representative at locations where the manufacturer does not wish to do so. At

Sylvania's request Mr. Justice Clark instructed the jury below precisely to that effect. This case does not involve any assertion by Continental that it may hold itself out as a franchised, or authorized dealer of Sylvania at any location where Sylvania has not conferred on Continental the right to profit from Sylvania's name and good will. This case turns on a very different question—namely, whether a manufacturer can by agreement foreclose a retailer from shipping its own merchandise from a franchised location to a non-franchised location for resale, an issue not involved in *Salco*, but to which *Schwinn* clearly speaks. For another, the majority below relies on cases like *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) which hold that a manufacturer may agree that *it* will sell only to one dealer in a territory; obviously cases involving such exclusive dealerships, restraints solely on the manufacturer's own sales, cannot after *Schwinn* be read as implying that a manufacturer can also agree to stamp out efforts by competing dealers to ship goods purchased elsewhere into a competitor's territory for resale. *Schwinn* says that to be lawful the exclusive dealership must stop at " 'confinement' of the manufacturer's own sales," an arrangement at "the other extreme" from resale restrictions on the dealer. (388 U.S. at 376)

The majority opinion by Judge Ely below also signals its attitude about *Schwinn* by its use of secondary authority. Probably no antitrust decision of recent memory has had such ardent champions or vehement

detractors as *Schwinn*.[3] From among this vast literature the pieces chosen for special comment and apparent approval by the majority below were an article and several student comments discussing the withdrawn panel opinion in this very case.[4] All of these, though serving as briefs for the position taken by the majority below, are either overt or thinly disguised attacks on *Schwinn* itself. Not one of them assumes the need to find a principle on the basis of which this case can be distinguished from *Schwinn*. The reasons they offer for upholding the Sylvania restraint would, if accepted, require that the *Schwinn* restraint be upheld too.

Nor is it only its reliance upon dubious authorities which impeaches the majority opinion below; that opinion puts forth an analysis which displays the majority's lack of regard for *Schwinn*. Tracking Mr. Justice Stewart's dissenting opinion in *Schwinn*, the majority below asserts that the rule of *Schwinn* should not "be stretched to encompass [a] practice which can produce pro-competitive effects" by aiding interbrand competition. (App. A, p. 24) For a lower court to assert such a basis for putting *Schwinn* aside is startling. As Judge Browning insists (App. A, pp. 99-101, 79-80) *Schwinn* expressly recognizes the claim that territorial restraints may sometimes benefit interbrand structure; on this basis *Schwinn* both states that the rule of reason should be used to govern these restraints

[3]See, e.g., the materials cited at App. A, p. 2, fn. 1; pp. 17, 18, fns. 12 and 13; p. 20, fn. 15; p. 25, fn. 17; p. 33, fn. 24; p. 35, fn. 27; p. 67, fn. 2; p. 99, fn. 8; pp. 100-101, fn. 10; p. 103, fn. 13.

[4]See App. A, p. 2, fn. 1; pp. 17, 18, fns. 12 and 13.

when products are consigned rather than sold (388 U.S. at 380-81) and implies that a "new comer" or "failing company" defenses may be available to justify these restrictions even in cases where the manufacturer sells the goods. (383 U.S. at 374) In the second place, the *Topco* decision which involved horizontal territorial and related restraints, flatly rejects possible benefit to interbrand competition as a basis for sanctioning damage to intrabrand competition—and it does so on the basis of a principle which applies with equal force to vertical restraints of a similar kind. (405 U.S. at 610-11). Both *Schwinn* and *Topco* plainly establish the applicability of the per se rule. If this Court itself is constrained by stare decisis to apply the per se rule, certainly "at this late date" a lower federal court ought "not oppose" that rule on the basis of its own divergent policy views. See *United States v. Topco Associates, Inc., supra* at 613. (concurring opinion).

There is yet another circumstance which marks as wholly specious any claim that despite *Schwinn* and *Topco* benefits to intrabrand competition can in this case justify damage to intrabrand competition. In support of its rule of reason defense Sylvania offered and (over Continental's objection) the trial court and jury heard the testimony of an economist who has written extensively on resale restraints. Thus, the district court here, unlike the trial court or this Court in *White Motors*, had before it the manufacturer's full "rule of reason" defense when it ruled that the jury should not be allowed to speculate whether claimed interbrand benefits outweighed conceded intrabrand injury. That economic testimony, far from

undercutting the rationale of *Schwinn* and *Topco*, strongly confirmed it. It established that economic analysis cannot aid a court or jury to weigh asserted interbrand gains against established intrabrand losses.[4]

II. THE DECISION BELOW IS BLATANTLY OUT OF HARMONY WITH RECENT DECISIONS BY OTHER COURTS OF APPEAL AND CREATES CONFUSION IN AN AREA WHERE EVERY FIRM ENGAGED IN DISTRIBUTING MERCHANDISE NEEDS TO KNOW THE LAW

Every firm manufacturing or selling merchandise must set up or participate in a distribution system. Thus, when *Schwinn* was decided it appeared to settle the law on a major question which confronts virtually every manufacturer and distributor and vast numbers of retailers throughout the country. Given the decision below confusion again reigns.

As shown above, the court of appeals majority holds *Schwinn* inapplicable to a restraint in a different form from that in *Schwinn* even though its con-

[4]On direct examination, the most the economist, Lee Preston, could bring himself to say was that "Sylvania is in there. They are at the bottom, but in there. Now *if* we squeeze out the bottom firms—we would see a decline in competition among brands in all the major markets in the country. Therefore, *if* this distribution policy or any particular distribution has the effect of strengthening Sylvania or any other smaller firm as a competitive force—then I think we have to look carefully at that policy as . . . a procompetitive policy . . ." App. A, p. 48, footnote 36) (emphasis added) Then, on cross-examination Preston's testimony frankly discloses that he was not asserting that Sylvania was in danger of falling out of the market if it could not use its restrictive distribution policy and that the current state of economic theory provides no way to tell whether this or any restrictive distribution policy yields offsetting advantage to competition at the manufacturer level. (App. A, pp. 104-106 (especially footnotes 15 and 16)).

ceded purpose and its effect are substantially identical with those used in *Schwinn*. So doing, the majority below collided head on with two other courts of appeal. The Eighth Circuit has held that *Schwinn* applies to any resale restraint "[w]hatever their appellation or garb" which "have the effect of being unlawful territorial and customer restraints." *Reed Brothers, Inc. v. Monsanto Company*, 525 F.2d 486, 500 (8th Cir. 1975), cert. denied, 46 L.Ed.2d 645 (U.S. Sup. Ct., 1976). The Fifth Circuit decision in *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 899-901 (5th Cir. 1973) is to the same effect. Both those cases explicitly hold that *Schwinn* governs any vertical restraint having the purpose and effect of confining the persons to whom or places at which customers may resell. Identity in form to the *Schwinn* restraint need not be shown in order to invoke the *Schwinn* rule.[5]

[5]Nor is the conflict noted in the text the only source of confusion. The Court of Appeals for the Third Circuit, though not going so far as does the majority below, held in *Tripoli Company Inc. v. Wella Corporation*, 425 F.2d 932 (3rd Cir.), cert. denied, 400 U.S. 831 (1970) that *Schwinn* is inapplicable where the manufacturer has a business reason other than concern about resale competition for imposing a vertical resale restraint. On similar facts the Court of Appeals for the Tenth Circuit followed *Schwinn*, but with expressed reluctance (*Adolph Coors Company v. FTC*, 497 F.2d 178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975)) but the Court of Appeals for the Fifth Circuit insisted that *Schwinn* could not—and even if it could, should not—be distinguished. *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975). Adding peripherally to the confusion are cases from the Second Circuit, some of which warmly embrace *Schwinn* (e.g. *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621, 622 (2d Cir. 1969)), others of which seem to make the applicability of *Schwinn* turn not upon the imposition of the territorial restraint, but upon firm and resolute enforcement (e.g. *Janel Sales Corp. v. Lanvin Parfums, Inc.*, 396 F.2d 398, 406 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968), and cases like *Carter-Wallace Inc. v. United States*, 449 F.2d 1374, 1380 (Ct. Cl. 1971) which trivializes *Schwinn*.

The majority opinion below, by adding its weight to the anti-*Schwinn* side of what had been largely an academic debate—and by doing so on a fact situation devoid of any alternative issue, such as price fixing, or any principled basis for distinguishing *Schwinn*—has granted itself the prerogative of rewriting the law announced by this Court, and has done so in rhetoric which lacks either balance or candor. In consequence, confusion and doubt will now plague the marketplace. No trader will know the extent to which manufacturers may dictate to dealers and distributors about where they may resell. No lawyer with clients whose business traverses two judicial circuits will be able to advise whether restraints differing only in form from *Schwinn* will be governed by a per se rule or be subject to the rule of reason.

If *Schwinn* is to be overruled, it should be overruled by this Court, and overruled candidly; it should not be dispatched by the court below in a specious majority opinion. If *Schwinn* is to be modified, it should be modified by this Court, with deliberation, not left to unravel as other courts and commentators, encouraged by the decision below, begin to pick at it. If *Schwinn* is to remain the law, this Court must clearly teach that the majority below is wrong and does not have the power to reduce *Schwinn* to a legal exercise devoid of force or principle.

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to review the decision below.

Dated, June 28, 1976.

Respectfully submitted,

JESSE CHOPER,
LAWRENCE A. SULLIVAN,
GLENN E. MILLER,
Attorneys for Petitioners.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 71-1705

GTE Sylvania Incorporated,
Appellant,
vs.
Continental T.V., Inc., a corporation; A & G Sales, a corporation; Sylpac, Inc., a corporation; and S.A.M. Industries, Inc., a corporation,
Appellees.

[April 9, 1976]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: CHAMBERS, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, KILKENNY, CHOY, GOODWIN, WALLACE, and SNEED, Circuit Judges.*

*Judges Koelsch and Trask recused themselves and did not participate in any aspect of this appeal. Senior Judge Kilkenny exercised his statutory prerogative to participate, pursuant to the provision of the last sentence of 28 U.S.C. § 46(c). Judge Kennedy did not participate because he did not assume his judicial position until after the full court heard the oral arguments of counsel and thereafter conducted its private deliberations.

ELY: Circuit Judge:

Pursuant to a jury verdict in a private antitrust action, a judgment and an equitable decree were entered in favor of the appellees (hereinafter, collectively, "Continental") and against the appellant (hereinafter "Sylvania"). On this appeal by Sylvania, the critical issue is whether the district judge erred in concluding and instructing the jury accordingly, that, under the supposed rationale of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), Sylvania's practice of fixing by agreement the locations from which Continental was authorized to sell Sylvania's products was illegal *per se* under Section 1 of the Sherman Act. For the many reasons set forth below, we reverse.[1]

I. *Factual Background*

Sylvania, a corporate subsidiary of General Telephone and Electric, manufactures and sells radios and television sets through its Home Entertainment Products Division. Though Sylvania emerged from World War II as one of the major manufacturers in the television industry, its share of the market

[1]The majority and dissenting opinions of the panel first concerned with the appeal, unofficially reported in 1974-1 Trade Cas. ¶75,072 (9th Cir. May 9, 1974), was withdrawn by the full court's Order of December 19, 1974. The original majority opinion has been the subject of a number of law review commentaries. *See* Robinson, *Recent Antitrust Developments—1974*, 75 Colum. L. Rev. 243 (1975), and the case notes at 88 Harv. L. Rev. 636 (1975); 26 Mercer L. Rev. 629 (1975); 53 N.C.L.Rev. 775 (1975); 49 N.Y.U.L.Rev. 957 (1975); 53 Tex. L. Rev. 127 (1975); 10 Colum. J.L. & Social Prob. 497 (1974).

never became large. In the post-war era, when only black and white television was the industry's major product line, a single competitor, RCA, enjoyed sixty to seventy percent of the market, and the remainder was divided among Sylvania and 130 other manufacturers. During the so-called black and white era, most television manufacturers engaged in a relatively unselective "saturation" method of distribution. Essentially, this system involved the sale of television sets both to independent and manufacturer-owned distributorships, without any limit on the number of dealers in a given locale. The goal of such a system was to generate as much volume as possible; therefore, manufacturers sought to sell as many dealers as possible.

By 1962 Sylvania's sales volume had decreased to a relatively tiny portion of the television market, between one and two percent, approximately. Prior to 1962 Sylvania's practice was to sell its products primarily to distributors, some of which it owned. These distributors sold, in turn, to retailers. At about this time Sylvania determined that its attempt to utilize the saturation type of distribution in competition, especially with RCA and Zenith, could not be successful. Hoping to revive itself as an effective interbrand competitor, and to avoid the virtually certain possibility that it would be compelled to surrender the business of manufacturing and selling television sets,[2] Sylvania decided to abandon its for-

[2]Certain testimony indicated that Sylvania instituted its elbow room policy in order to avoid being driven out of the television market. Ray J. Steiner, at the time of trial the Vice President of

mer method of saturation distribution and begin a program of selective distribution.[3] Sylvania's management apparently believed that it could become a more effective competitor in the then rapidly ex-

Sony Corporation of America, and prior to April, 1969, the National Sales Manager of Sylvania, testified as follows:

> ". . . basically elbow room was as a result of the fact that as a company we were in trouble. By that I mean that we needed something, a sales pitch that the sales company could use *in order for us to get a foot hold in the market.*
>
> Basically we were competing with RCA, Zenith, Magnavox, Motorola, private brands, and very frankly *we were not doing a good job.*
>
> So the elbow room is basically a selective or limited distribution approach that has been used by other companies in the business, for example, Magnavox, Frigidaire, and we decided that we could no longer have a me too approach to the dealers.
>
> Because if we were in a me too approach or the same type of approach as RCA or Zenith, basically there was no reason for the dealers to handle our line because they could handle other lines.
>
> • • •
>
> We knew that if the advent of this program, if it didn't work and we didn't keep our plant running in Batavia, there was the alternative that *we would probably go out of the television business.*" (Record at 2543-44) (Emphasis added).
>
> • • •
>
> . . . the result was that it [the elbow room policy] was successful. We did get a foothold in the market place and we were able to compete with the big boys in the business and it got the onus off our back *that we were going out of business.*" (Record at 2554) (Emphasis added).

William E. Boss, Jr., the Vice President of Marketing for Sylvania, testified that the purpose of the elbow room policy was:

> ". . . really to enable us and our retailers *to survive* profitably, to effectively compete in a marketplace. Limited distribution merely means that there are less dealers in a given area. We have, for example, perhaps one-sixth of the dealers of our competition, but by having a limited distribution policy we feel that we can develop a more mutually profitable business with the retailer.
>
> If we were to go out and compete with the majors *we would not be successful.*" (Emphasis added).

[3]Selective distribution was pioneered in the late 1950's by another company, Magnavox, which held only a small share of the television market. By utilizing this method of distribution, as above noted, Sylvania was able to increase its share of the market to approximately five percent, thereby becoming an effective interbrand competitor.

panding market for color television if it could develop a prestige image and a network of dealers with sufficient loyalty to Sylvania to market Sylvania products aggressively.

In 1962, as part of a reorganization of its Home Entertainment Products Division, Sylvania implemented its new selective distribution system by phasing out both its wholesale distributors and its own factory distributorships. These were replaced by a "straight line distribution" system (SLD), under which sales were made from the factory directly to franchised dealers, who in turn sold to consumers. This program, which Sylvania called its "elbow room policy", involved the use of franchises to limit the number of Sylvania retail dealers. Sylvania hoped to attract dealers willing to identify themselves as authorized Sylvania outlets in exchange for the opportunity to earn fair profits.

An essential element of Sylvania's "elbow room policy" was the practice of franchising by location. Under this policy Sylvania sold its products only to selected retailers, who were identified as authorized Sylvania dealers, and who were authorized to sell Sylvania products only at designated locations. There were agreements[4] between Sylvania and its dealers

[4]At trial Sylvania denied that its elbow room policy involved any express or implied agreement with its franchised dealers concerning the movement of television sets. Sylvania insisted that its elbow room policy was implemented unilaterally by an announcement. However, for purposes of this appeal Sylvania has deferred to the implied findings of the jury and has argued its appeal upon the assumption that an implied agreement existed between Sylvania and its dealers prohibiting the shipment of inventory to unauthorized locations.

that the dealer would not move Sylvania brand merchandise to a new unapproved location for resale without the prior approval of Sylvania.

Sylvania made specific efforts to avoid anticompetitive practices. No dealer was given an exclusive dealership for a particular area. In Northern California, for example, Sylvania had at least two or more authorized dealers serving every major metropolitan market larger than the City of Salinas. No dealer had the power to veto Sylvania's decision to approve an additional franchise location in a given market area. There were no agreements that in any way restricted the freedom of authorized Sylvania dealers to sell to anyone who came to their franchise location, regardless of the customer's place of residence.

The record contains evidence suggesting that this "elbow room policy" was moderately successful in improving Sylvania's competitive position. Sylvania asserts that due to its selective distribution policy and its practice of franchising by location, it became able to attract effective, aggressive dealers. With the growth of the color television market, Sylvania increased its market share from about one or two percent in 1962 to about five percent by 1965. By the mid-1960's Sylvania had emerged as a vigorous competitor, ranking as the nation's eighth largest manufacturer and seller of color television sets.

The appellees, Continental, are a group of affiliated corporations with common ownership. The principal operating officer of Continental, together with his

wife, owned substantially all of the stock of the corporations. Continental began business in 1960 as a retail dealer of radios and television sets in San Jose, California. Its primary sales territory included most of Santa Clara County, and its inventory consisted principally of television sets manufactured by Muntz T.V., Inc. Continental prospered, and in 1964 it replaced its downtown San Jose store with a larger suburban facility in a region known as the Stevens Creek area. In the 1960-64 period Continental had no credit arrangements for floor financing of its inventory with either Muntz, or any bank or credit institution. It handled its customer credits largely through a local bank in San Jose.

In May, 1964, Sylvania attracted Continental to become an authorized Sylvania dealer and granted franchises to Continental for several locations. In July, 1964, Continental began financing its purchases of Sylvania merchandise with the "Maguire plan", under which Continental executed a promissory note for the price of inventory purchased from Sylvania, with payment secured by a trust receipt in favor of John P. Maguire & Co., Inc., a national finance company. Continental was obligated to repay Maguire Continental's cost for each television set immediately after the set was sold (or six months after Continental's receipt of unsold merchandise). Sylvania maintained some control over the amount of credit to be extended to Continental, because in the event of Continental's default, Maguire had full recourse against Sylvania.

Continental expanded rapidly. By May, 1965, it had become one of the largest Sylvania dealers in the country,[5] operating Sylvania franchises at eight locations in the California counties of San Francisco, Santa Clara, San Mateo, and Alameda. In the spring of 1965 Continental learned that Sylvania was planning to franchise another dealer, Young Brothers, at a location on Geary Street in San Francisco, about one mile from one of Continental's outlets. Continental allegedly believed that the franchising of this location would violate the spacing concept underlying the "elbow room policy". It therefore strenuously objected and threatened to reappraise its need for Sylvania merchandise in its San Francisco store. In June, 1965, Sylvania franchised the Young Brothers store. Continental thereupon canceled a very large Sylvania order, placed a half-million dollar order with a Sylvania competitor called Philco, and advised Sylvania that Continental would reduce its further purchases from Sylvania.

In March, 1965, Continental had notified Sylvania that it wished to enter the Sacramento, California, market. In compliance with Sylvania's policy, Continental had initially agreed not to sell Sylvania's merchandise from a Sacramento location without Sylvania's prior approval. As he had previously done when Continental opened a store at a new location, Continental's principal operating officer organized a new corporate affiliate (S.A.M. Industries, Inc.) and,

[5]In 1965, Continental opened five new stores. Its sales volume exceeded $1,000,000, and it had a $300,000 line of credit with Sylvania.

through that affiliate, leased a Sacramento location about one mile from another Sylvania dealer, Handy Andy. In early September, 1965, Continental advised Sylvania of the location of the new Continental store in Sacramento and requested approval for a franchise to sell Sylvania products there. Sylvania replied that approval would be denied. Thereafter, Continental moved Sylvania merchandise into the Sacramento store. According to some of the testimony, Sylvania refused Continental's request for a Sacramento franchise because Sylvania's management believed that Sylvania's distribution in the area was already sufficient and that additional Sylvania retail outlets would be undesirable. On September 7, 1965, Continental decided that it would violate locations agreement that it had made with Sylvania and proceed to sell Sylvania merchandise in Sacramento without Sylvania's approval. One of Sylvania's contentions is that Continental's move into the Sacramento area was made in retaliation for Sylvania's decision to franchise Young Brothers in San Francisco and represented an attempt by Continental to pressure Sylvania into revoking the Young Brothers franchise.

While all these events were occurring in Sacramento, credit personnel at Sylvania's headquarters had become deeply concerned over Continental's ability to meet its obligations under its financing arrangements. Sylvania had received information sometime prior to June, 1965, that Continental's principal shareholder and chief operating officer had

a criminal record. Sylvania ordered and received a Dun and Bradstreet report which confirmed that the chief officer had a military conviction while in the Marine Corps for misappropriation of government funds and issuing worthless checks. A second alleged cause for the concern of Sylvania's credit personnel was the fact that Continental had substantially increased its obligations to Philco by a capital loan and a $500,000 order for Philco products. This was in addition to Continental's existing high credit limit, $300,000 with Sylvania. Additionally, Continental had failed to pay past due obligations for its purchase of Sylvania products. These obligations were held by Maguire for Sylvania and were passing into maturity and then delinquency stages. Finally, on September 24, 1965, Continental informed Sylvania that pending resolution of the dispute over Continental's new Sacramento store, all of its future obligations would be paid as they matured by the deposit of checks with its, Continental's own attorneys.

Because of its concern, Sylvania's credit department placed a credit hold on Continental's orders and on September 16, 1965, reduced Continental's credit line from $300,000 to $50,000. In reaction to the credit reduction, Continental withheld all payments due to Maguire. This refusal to make payment continued for over three weeks until Continental owed $62,000 to Sylvania, unsecured by any merchandise. At that time Maguire instituted suit against Continental for the amount due, repossessed the Sylvania merchandise in Continental's possession, levied attachments on Continental's places of business and bank account, and caused Continental's San Jose stores and central warehouse to be closed. A bank with which Continental had done business terminated Continental's consumer financing program and called for the payment of a commercial loan. Finally, Sylvania notified Continental that Continental's franchise as a Sylvania dealer was terminated.

Continental sought damages from both Sylvania and Maguire, alleging violations of the antitrust laws and tortious injury to its business and property, a pendent claim under California law. Continental alleged that Sylvania's credit actions were not based upon a genuine concern about Continental's solvency, but rather were undertaken to enforce the location restriction and to prevent Continental from selling Sylvania merchandise from the unauthorized Sacramento location. Continental further asserted that Sylvania's "elbow room policy" was a policy in restraint of trade, constituting a *per se* violation of Section 1 of the Sherman Act. Damages were alleged to have resulted from Sylvania's termination of its relationship with Continental and Continental's resulting inability to procure substitute products during a period of product shortage. Continental also sought an injunction prohibiting Sylvania from enforcing its locations restrictions. Continental's antitrust and tort claims were submitted to the jury. The jury returned a verdict in favor of Continental[6] and found that Continental

[6]The jury's verdict was returned in the form of answers to special interrogatories. The verdict in respect to the antitrust

had been damaged in the amount of $591,505. The jury decided that John P. Maguire & Co., the only other defendant, had not engaged in a combination, contract, or conspiracy in restraint of trade in violation of the antitrust laws. Finally, the jury exonerated both Sylvania and Maguire on Continental's pendent tort claim under California law. Trebling the damages pursuant to 15 U.S.C. § 15, the district judge entered judgment against Sylvania in the amount of $1,774,515. In addition, the court awarded Continental attorney's fees in the sum of $275,000.

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claim is as follows:

A. *Antitrust Claim*

1. Did Sylvania Electric Products, Inc. engage in a contract, combination, or conspiracy in restraint of trade in violation of the antitrust laws with respect to location restrictions and price fixing as an integral part of a single distribution policy?

Yes	No
	X

2. Did Sylvania Electric Products, Inc. engage in a contract, combination, or conspiracy in restraint of trade in violation of the antitrust laws with respect to locations restrictions alone?

Yes	No
X	

3. Did John P. Maguire & Co., Inc. engage with Sylvania in a contract, combination or conspiracy:

a. As described in Question 1 above?

Yes	No
	X

b. As described in Question 2 above?

Yes	No
	X

4. If the answer to Question 1, 2, or 3 is "yes", did Continental T.V., Inc. sustain damage to its business or property as a proximate result of such violation of the antitrust laws?

Yes	No
	X

5. If the answer to Question 4 is "yes", what is the amount of such damage? $591,505

On Continental's prayer for equitable relief, the district judge entered findings of fact and conclusions of law. The non-jury court found that Sylvania had requested Maguire to sue Continental on its outstanding notes as a part of Sylvania's attempt to prevent Continental from selling Sylvania products in Sacramento.[7] Further, the court found that Sylvania's credit concerns were not the true reason for Sylvania's actions. The court entered a limited injunction,[8] prohibiting Sylvania from enforcing its location clause.[9]

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[7]The trial judge's finding on this point appears to be in conflict with the finding of the jury that Maguire and Sylvania were not involved in any contract, combination, or conspiracy to enforce the location restriction. When issues common to both legal and equitable claims are to be tried together, the legal issues are to be tried first, and the findings of the jury are binding on the trier of the equitable claims. *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). We therefore rely upon the findings of the jury if they appear to be inconsistent with findings of the trial judge.

[8]Since the incidental injunctive relief granted below was predicated upon the application of an erroneous legal standard (*See* the District Court's conclusion of law No. 5, quoted *infra* note 9), the equitable Decree, in addition to the legal Judgment, must be vacated. *See United States v. Parke Davis & Co.*, 362 U.S. 29, 44 (1960); *Beverage Distributors, Inc. v. Olympia Brewing Co.*, 440 F.2d 21 (9th Cir.), *cert. denied*, 403 U.S. 906 (1971).

[9]The district judge entered findings of fact and conclusions of law pertaining to the equitable Decree. The most significant conclusions are as follows:

> "3. Sylvania, during the time involved herein, and in violation of Section 1 of the Sherman Act, did engage in a contract, combination or conspiracy with its retail dealers, including Handy Andy and Continental, pursuant to which it restricted and enforced its location distribution policy and imposed a system of location restraints upon its retail dealers limiting for all practical purposes the areas in which they could display and sell Sylvania brand products which the dealers had purchased from Sylvania and which were owned by them.
>
> 4. As a proximate result of Sylvania's conduct as above described, Continental sustained damage to its business and property as found by the jury. Moreover, equitable relief

Sylvania's principal contention here is that the district judge erred in basing both the jury instructions and the grant of equitable relief on the theory that by seeking to restrict the locations from which Continental could sell Sylvania products, Sylvania had committed a *per se* violation of Section 1 of the Sherman Act. Over Sylvania's objection, the trial judge instructed the jury as follows:

> "Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy, with one or more of its dealers pursuant to which Sylvania exercised dominion and control over the products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of Section 1 of the Sherman Act, regardless of the reasonableness of the location restrictions."[10]

having been granted in the Judgment heretofore entered on the 11th day of December, 1970, the Court deems it necessary to enter in support thereof, Findings of Fact and Conclusions of Law contained herein.

5. The foregoing restraints are *per se* violations of Section 1 of the Sherman Act, inasmuch as Sylvania made sales to its retailers upon 'condition, agreement or understanding limiting the retailers freedom as to where and to whom it will resell the products', these sales having been made 'subject to territorial restrictions upon resale.' *United States v. Arnold* [,] *Schwinn & Co.*, 388 U.S. 378-379 (1967)."

[10]The trial judge in this case was the distinguished Associate Justice Tom C. Clark (Ret.), sitting by designation in the District Court. In formulating his jury instructions, Justice Clark apparently adopted some of his own dissenting comments in *White Motor Co. v. United States*, 372 U.S. 253, 275 (1963). There, the majority of the Court, against the will of Mr. Justice Clark, declined to establish a broad *per se* rule regarding all vertical territorial restraints.

In deciding that the *per se* rule of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), was applicable to Sylvania's location restrictions, the court rejected instructions requested by Sylvania under which the jury would have been told that Sylvania's locations practice was illegal only if it *unreasonably* restrained competition in the market for television sales.[11]

Once the instruction incorporating the theory of *per se* illegality was submitted, a verdict against Sylvania was virtually assured. Sylvania never denied the existence of its locations practice, which by definition admittedly "restrict[ed] outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania. . . ." It is not entirely clear from the jury instructions and the findings of

[11]The court also rejected a jury instruction proposed by Sylvania which propounded the theory that even if the Schwinn *per se* rule were applicable to locations restrictions, Sylvania would be exonerated if it could prove a "failing company" defense. The rejected instruction reads as follows:

> "If you find such a contract, combination or conspiracy to restrain movement or sale of merchandise, such a practice would be presumptively unlawful. However, before you can find it to be a violation of the antitrust laws, you must consider whether it was justified. In this case, such a restriction would be justified if Sylvania had proved by a preponderance of the evidence that *the adoption of such a restriction was reasonably necessary to enable Sylvania to remain in the television business* or to enable it to increase the strength and effectiveness of its competitive efforts in the television industry. If you find that such justification has been shown, you should find that Sylvania and Maguire have not violated the antitrust laws. If you find that Sylvania has not proved such a justification by a preponderance of the evidence, and if you find the existence of a contract, combination or conspiracy to restrict movement or sale of merchandise, as I have defined it above, then you should find that Sylvania has violated the antitrust laws." (Emphasis added).

fact and conclusions of law entered on the equitable claim whether Sylvania was found to have committed an illegal *per se* violation merely because it entered the agreement restricting Continental to specific locations, or because of the subsequent enforcement of that agreement. We think it irrelevant as to whether both, or only one, of these considerations were applied, since we hold that under either, the court's application of the law was clearly erroneous.

II. *Analysis.*

We confront an important and intriguing question, i.e., whether the rule of *per se* illegality established by the Supreme Court in *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), should be extended to embrace the "locations practice" utilized by Sylvania and others as a method of modern product distribution systems. The trial judge, applying a bit of the literal language of *Schwinn* without reference to its context or the specific facts of that case, determined to extend that language to encompass locations clauses. Accordingly, Sylvania's proffered "rule of reason" jury instruction was rejected. Our study has convinced us, beyond doubt, that the challenged conclusion reflects a misinterpretation of *Schwinn,* is inconsistent with the existing law permitting exclusive dealerships, and, most importantly, would seriously undermine, rather than implement, the major purpose of the Sherman Act. That purpose is to insure the "unrestrained interaction of competitive forces" that "will yield the best allocation of our economic re-

sources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Ry. v. United States,* 356 U.S. 1, 4 (1958). We therefore hold that the legality of the locations clauses here involved should be judged under what is commonly referred to as the "rule of reason", rather than a rule of *per se* illegality. We are convinced that a contrary holding would constitute an unwarranted "body blow" to legitimate business enterprise and would place our free capitalistic system under stifling restraints, never contemplated or intended by the Congress. The "rule of reason" should have been applied, permitting inquiry into the competitive effect and reasonableness of the locations agreement in question.[12]

A. *The Schwinn Precedent in Context*

In ruling that Sylvania's locations practice was illegal *per se,* the trial judge chose to apply, literally, the following sweeping language from the opinion of

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[12]We think it noteworthy that *all* of the law review commentators who have undertaken a detailed analysis of the decision of our court's original panel have reached the conclusion that the District Court's application of a *per se* rule of illegality was wholly inappropriate and that, in light of the purposes of the Sherman Act, the "rule of reason" should have been applied. Robinson, *Recent Antitrust Developments—1974,* 75 Colum. L. Rev. 243, at 278-79 (1975); 88 Harv. L. Rev. 636, 641-42, 648 (1975); 26 Mercer L. Rev. 629, 637 (1975); 53 N.C.L. Rev. 775, 784-85 (1975); 49 N.Y.U.L. Rev. 957, 969 (1975); 53 Texas L. Rev. 127, 134-37 (1974).

Mr. Justice Fortas for the Court in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967):[13]

> "Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent

[13]If we thought the opinion of Mr. Justice Fortas in *Schwinn* to control our present decision, our duty would compel us to apply *Schwinn*. And this we would do, despite the fact that the opinion of Mr. Justice Fortas has frequently been criticized for the breadth of a small portion of its language and its primary reliance upon the "ancient rule against restraints on alienation," 388 U.S. at 380, a rule described in Mr. Justice Stewart's dissent as a "wooden and irrelevant formula." *Id.* at 394. *See generally* Comegys, Moderator, *Restraints in Distribution: General Motors, Sealy and Schwinn, a Symposium on Ancillary Restrictions*, 36 *ABA Antitrust* L.J. 84 (1967); Handler, *Twenty-Fifth Annual Antitrust Review*, 73 Colum. L. Rev. 415, 458-59 (1973); Handler, *The Twentieth Annual Antitrust Review—1967*, 53 Va. L. Rev. 1667, 1680-86 (1967); Keck, *The Schwinn Case*, 23 Bus. Lawyer 669 (1968); McLaren, *Marketing Limitations on Independent Distributors and Dealers—Prices, Territories, Customers, and Handling of Competitive Products*, 13 Antitrust Bull. 161, 168 (1968); Orrick, *Marketing Restrictions Imposed to Protect the Integrity of 'Franchise' distribution Systems*, 36 ABA Antitrust L.J. 63, 69-72 (1967); Pollack, *Antitrust Problems in Franchising*, 15 N.Y.L.F. 106, 110-13 (1969); Pollack, *Alternative Distribution Methods After Schwinn*, 63 Nw. L. Rev. 595 (1968); Sadd, *Territorial and Customer Restrictions After Sealy and Schwinn*, 38 U. Cin. L. Rev. 249 (1969); Williams, *Distribution and the Sherman Act—The Effects of General Motors, Schwinn and Sealy*, 1967 Duke L.J. 732, 740 (1967); Note, *Restrictive Distribution Arrangements after the Schwinn Case*, 53 Cornell L. Rev. 515 (1967); *The Supreme Court, 1966 Term*, 81 Harv. L. Rev. 69, 235-38 (1967); Note, *Territorial Restrictions and Per Se Rules—A Re-evaluation of the Schwinn and Sealy Doctrines*, 70 Mich. L. Rev. 616 (1972); Comment, *Vertical Territorial Restraints and the Per Se Concept*, 18 Buffalo L. Rev. 153, 161 (1969); Comment, *The Impact of the Schwinn Case on Territorial Restrictions*, 46 Texas L. Rev. 497, 511 (1968).

> combination or understanding with his vendee—is a *per se* violation of §1 of the Sherman Act."[14]

388 U.S. at 382.

We reiterate our view that this language, in isolation, was applied too literally, without sufficient reference to the textual context in which it appears or the facts from which *Schwinn* arose. Furthermore, a fundamental antitrust principle, which our own court stressed in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert denied*, 396 U.S. 1062 (1970), was apparently overlooked. Quoting from *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563, 579 (1925), we emphasized in *Hawaiian Oke* the Supreme Court's admonition that :

> ". . . each case under the Sherman Act must be determined upon the particular facts disclosed by the record, and . . . the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied."

416 F.2d at 79.

[14]The District Court may also have relied, to some extent, and with some justification, upon certain additional isolated language from *Schwinn*.

> "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine *areas or persons* with whom an article may be traded after the manufacturer has parted with dominion over it. *White Motor, supra; Doctor Miles, supra.* Such restraints are so obviously destructive of competition that their mere existence is enough." 388 U.S. at 379 (Emphasis added).

In *Schwinn* the Supreme Court held illegal *per se* a system of vertical restraints affecting both wholesale and retail distribution. Arnold, Schwinn & Company had created exclusive geographical sales territories for each of its 22 wholesale bicycle distributors and had made each distributor the sole Schwinn outlet for the distributor's designated area. Each distributor was prohibited from selling to any retailers located outside its territory. Moreover, the restrictions in *Schwinn* limited the classes of customers to whom Schwinn's wholesale distributors and franchised retailers could sell, by prohibiting them from selling Schwinn products to unfranchised retailers. Consequently. Schwinn's system completely barred sales to some potential purchasers of Schwinn products, regardless of where these customers were located. The *Schwinn* restrictions on classes of persons or particular persons to whom a distributor may not sell have been termed "customer" restrictions, while the restrictions against selling to customers outside a certain area are classified as "territorial" restrictions.[15]

In our present case Sylvania imposed neither of the restrictions that *Schwinn* appropriately condemned. Schwinn's territorial restrictions requiring dealers to confine their sales to exclusive territories prescribed by Schwinn prevented a dealer from competing for customers outside his territory. In contrast, Sylvania's dealers could sell to customers from any area, could advertise in any area, and were limited only as to the location of the franchisee's place of business. Schwinn's restrictions guaranteed each, wholesale distributor that it would be absolutely isolated from all competition from other Schwinn wholesalers. Sylvania, on the other hand, franchised competing dealerships at will and in the major metropolitan markets in Northern California such competing dealers were located within the 25 to 30 mile radius of volume selling. Schwinn's territorial restrictions were tied to customer restrictions, but a Sylvania dealer could sell to anyone, just so long as the dealer's store remained in the approved location.

[15]Pollack, *Alternative Distribution Methods after Schwinn*, 63 Nw. U.L. Rev. 595 (1968); Williams, *Distribution and the Sherman Act—The Effects of General Motors, Schwinn and Sealy*, 1967 Duke L.J. 732; Note, *Vertical Customer and Territorial Restrictions and the Sherman Act*, 63 Nw. U.L. Rev. 262 (1968); Note, *Restrictive Distribution Arrangements after the Schwinn Case*, 53 Cornell L. Rev. 514 (1968).

Thus a critical and very obvious distinction between the restrictions in *Schwinn* and those of Sylvania is that *Schwinn* involved a restriction on the locations and types of permissible *vendees,* while Sylvania only imposed restrictions on the permissible locations of *vendors.* When *Schwinn's* proscription of restrictions on "territory or persons to whom the product may be transferred", 388 U.S. at 382, and on "areas or persons with whom an article may be traded", 388 U.S. at 379, are interpreted in *Schwinn's* factual context, it is clear to us that "territory" and "areas" refer to the location of vendees, rather than vendors. Moreover, there are very clear and substantial differences between the effect of the restrictions in *Schwinn* and the effect of those of Sylvania. In *Schwinn* a wholesale distributor was foreclosed from selling Schwinn

products to any purchaser located outside his exclusive territory; thus, intrabrand competition (i.e., competition between sellers of the same brand) was wholly destroyed. A potential purchaser of Schwinn products at the wholesale level could look to only one source of the product—the authorized dealer for his territory. No other wholesaler could compete by offering a lower price or better service to the same purchaser. In marked contrast, Sylvania franchised at least two dealers in the major markets and each Sylvania dealer was *free to sell to any buyer he chose*—preserving intrabrand competition and allowing to every potential purchaser of Sylvania products a reasonable choice between several competing dealers.

Concurring in *White Motor Co. v. United States*, 372 U.S. 253 (1963),[16] Mr. Justice Brennan noted that while there are no possible procompetitive benefits to be derived from vendee, or customer, restrictions, some territorial restrictions on vendors may have procompetitive effects. The Justice wrote

> "There are other situations, not presented directly by this case, in which the possibility of justification cautions against a too hasty conclusion that territorial limitations are invariably unlawful. Arguments have been suggested against that conclusion, for exampie, in the case of a manufacturer starting out in business or marketing a new and risky product; the suggestion is that

[16] *White Motor Co. v. United States*, 372 U.S. 253 (1963), involved customer restrictions that precluded distributors and dealers from selling trucks to any federal or state government or subdivision thereof and to other large customers without the permission of the manufacturer.

> such a manufacturer may find it essential, simply in order to acquire and retain outlets, to guarantee his distributors some degree of territorial insulation as well as exclusive franchises. It has also been suggested that it may reasonably appear necessary for a manufacturer to subdivide his sales territory in order to ensure that his product will be adequately advertised, promoted, and serviced."

372 U.S. at 269.

> "I turn next to the customer restrictions. These present a problem quite distinct from that of the territorial limitations. The customer restraints would seem inherently the more dangerous of the two, for they serve to suppress all competition between manufacturer and distributors for the custom of the most desirable accounts. At the same time they seem to lack any of the countervailing tendencies to foster competition between brands which may accompany the territorial limitations. In short, there is far more difficulty in supposing that such customer restrictions can be justified."

372 U.S. at 272.

The observations of Mr. Justice Brennan also spotlight another significant distinction between our case and *Schwinn*. Schwinn had an extremely large share of the bicycle market. Sylvania's market share, however, was so small when it adopted its locations practice that it was threatened with expulsion from the television market. In *Schwinn* a manufacturer with a dominant market share imposed restraints which destroyed any possibility of intrabrand competition in

the same territory. Here, a manufacturer with a precarious market share entered agreements which enabled it to achieve a viable 5% market share while preserving significant intrabrand competition in each metropolitan area. When viewed in their respective factual contexts, we cannot possibly perceive the situation presented in the two cases as being analogous or similar, even remotely.

The facts in *Schwinn* make it clear that the territorial restraint which the Court condemned was a restraint that absolutely prohibited a dealer from selling to purchasers outside a certain area. That, of course, is not our case. The *Schwinn* holding that restrictions forbidding dealers from selling to persons located outside specifically designated exclusive territories and to certain classes of customers are *per se* violations of the Sherman Act should, we think, be stretched to encompass Sylvania's practice which can produce pro-competitive effects, desirable effects wholly different from those produced by the restrictions that the Court, in *Schwinn,* sought to prohibit.

Our interpretation of *Schwinn* is reinforced by the fact that the decree on remand in *Schwinn* expressly sanctions locations clauses. After paraphrasing the general language of the Supreme Court's *Schwinn* decision dealing with restrictions on "areas or persons", the District Court's decree on remand adds: "Notwithstanding the foregoing provisions, nothing in this Final Judgment shall prevent Schwinn . . . from designating in its retailer franchise agreements

the location of the place or places of business for which the franchise is issued." United States v. Arnold, Schwinn & Co., 291 F. Supp. 564, 565-66 (N.D. Ill. 1968) (Emphasis added). Surely, if a manufacturer has the right to choose a particular dealer to franchise, as the Supreme Court recognized in *Schwinn,* 388 U.S. at 376,[17] and the right to designate the location where the franchise is valid, as recognized in the *Schwinn* decree on remand, then the manufacturer must have the power to enforce these rights if a franchisee violates his location clause agreement.

When we move beyond *Schwinn* to a consideration of other relevant precedent,[18] our conclusion is fur-

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[17]One exceptionally distinguished commentator, very recently the Assistant Attorney General heading the Antitrust Division of the Department of Justice and now a United States District Judge, has interpreted *Schwinn* as clearly exempting locations clauses from the rule of *per se* illegality because a locations clause is implicit in this right of a manufacturer to select his dealers:

> "Justice Fortas' opinion *does* clearly exempt two types of arrangements. First, it upholds the right of a manufacturer to select—or 'franchise'—the dealers 'to whom, alone, he will sell his goods'—citing *United States v. Colgate & Co.,* 250 U.S. 300 (1919)—where competitive products are readily available. A necessary element of the right to 'franchise'—which I suggest is really a word of art covering the Category 2 arrangement described earlier—is the right to have a 'location clause.' That is, a manufacturer must be free to appoint another to be his dealer at a given place and to agree not to appoint another dealer within a certain distance. If this were not so, a manufacturer would exhaust his right of dealer selection—which Justice Fortas says he has—once he appointed a single dealer. Moreover, the autodealer location clause—allowed to stand in the *General Motors Discount House* case—would be outlawed *sub silentio."*

McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal,* 37 Antitrust L.J. 137, 144-45 (1968) (footnote omitted).

[18]The conclusion we reach is not inconsistent with the recent decision of the United States Court of Appeals for the Fifth Circuit in *Copper Liquor, Inc. v. Adolph Coors Co.,* 506 F.2d

ther strengthened. We have discovered no reported cases wherein a location clause has been struck down for illegality. In fact, and to the contrary, it has been

934 (5th Cir. 1975). Two fundamental distinctions between *Coors* and the present case make the reasoning of *Coors* inapplicable to our situation: (1) *Coors* involved overt price fixing, a clear *per se* violation of section one of the Sherman Act. As Judge Gee pointed out in his concurring opinion (506 F.2d at 955), any consideration of *Schwinn* was unnecessary to the decision in *Coors*. (2) The restrictions involved in *Coors* were, like those in *Schwinn*, designed to foreclose all intrabrand competition, while Sylvania's "elbow room policy" undeniably retained and fostered substantial intraband competition.

In *Coors*, the plaintiff alleged that Coors combined or conspired with its distributors to fix the retail price of its beer and caused its distributors, servicing the plaintiff's liquor store, to discontinue the supply of Coors beer to the plaintiff when he sold below the suggested retail price and declined to give assurances that he would not continue to do so in the future. 506 F.2d at 936. Vertical price fixing, of course, has long been recognized as a *per se* violation of the Sherman Act. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). There being evidence that Coors had conspired to fix prices, we agree with Judge Gee that it was unnecessary for the court to rely upon *Schwinn* so as to hold that Coors' practices were a *per se* antitrust violation. But of more significance is the fact that the *Coors* opinion explicitly recites that the evidence of price fixing was the foundation for the determination that Coors' restrictions ran afoul of the *Schwinn* holding:

> ¶"We do not say that vertically imposed territorial restrictions may never comport with the Sherman Act; *Schwinn* itself conceded they might be proper in the case of new entrants in a highly competitive field or 'failing companies'. *And there may be other exceptions.* We say only that this record does not, as a matter of law, provide justification for excepting Coors from the effect of *Schwinn*, in light of the price fixing evidence." 506 F.2d at 945 (Emphasis in original).

Later in the *Coors* opinion the court abandoned an inquiry into various exceptions which the Tenth Circuit has engrafted onto the *Schwinn* rule, saying:

> "But we need pursue the question no further here. Coor's restraints were ancillary to an illegal price fixing scheme." 506 F.2d at 947-48.

We therefore believe that there is no significant similarity between our situation and that presented in *Coors*. In *Coors* territorial restraints were utilized to effect vertical price fixing—a clear *per se* violation by whatever means it is achieved. Here,

widely assumed that location restrictions were reasonable restraints of trade, and therefore lawful,[19] ever since *Boro Hall Corp. v. General Motors Corp.*, 124 F.2d 822 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943). In *Boro Hall*, Judge Augustus Hand, writing

there was absolutely no evidence that Sylvania engaged in price fixing or that there was any other unlawful purpose underlying the location clause agreements.

The second major distinction between *Coors* and the present case inheres in the competitive effects of the challenged territorial agreements. In addition to his claim of price fixing, the plaintiff in *Coors* contended that "Coors conspired or combined with its distributors to create and enforce exclusive territories within which each distributor was to conduct his business, *making it impossible for the plaintiff to obtain a supply of Coors beer from another distributor* once his original supply had been cut off." 506 F.2d at 936 (Emphasis added). Mr. Coors himself stated that "unless the distributor could be assured that he would not be confronted with competition from another Coors distributor within his territory—*assured there would be no intrabrand competition*—the distributor would be unwilling to make the necessary capital expenditure, and lending institutions would be unwilling to extend credit to him." 506 F.2d at 938 (Emphasis added).

In contrast to the *Coors* restrictions which "assured that there would be no intraband competition" because the distributor promised to "conduct his wholesale disribution exclusively within the prescribed territory" (506 F.2d at 938), Sylvania permitted intraband competition. No Sylvania retailer was forbidden to sell to persons residing outside any prescribed territory, and Sylvania franchised more than one dealer in every major metropolitan area in Northern California. It was *not* impossible for a buyer to purchase from more than one seller, as it was for the plaintiff in *Coors*. Thus, the restriction in *Coors*, like the restriction in *Schwinn* and *unlike* Sylvania's location clauses, "assured that there would be no intraband competition."

Similar considerations apply to the Tenth Circuit's decision in *Adolph Coors Company v. FTC*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). We need not speculate as to how that decision might relate to locations clauses, since the Tenth Circuit expressly considered the legality of locations clauses in the later case of *Salco Corp. v. General Motors Corp.*, (discussed at p. 18, *infra*) and resolved the issue as we resolve it now.

[19] *See* Robinson, *Recent Antitrust Developments—1974*, 75 Colum. L. Rev. 243, 276 n.207 (1975).

for the Court of Appeals for the Second Circuit, specifically held that a dealer contract clause that would "fix a location for the sale of used cars at a place that did not unduly affect other dealers" did not constitute an unreasonable restraint of trade. 124 F.2d at 823. In *United States v. General Motors Corp.*, 384 U.S. 127 (1966), the Supreme Court was presented with a location clause which prohibited Chevrolet dealers from moving to, or establishing, a new location for the sale of Chevrolet vehicles without the prior approval of Chevrolet. The Government urged the Supreme Court to declare the clause illegal, but only insofar as it was employed to prohibit dealers from selling to discounters for resale. The Supreme Court expressly declined to do this,[20] although it held the conduct of General Motors and its dealers unlawful solely on the basis of a horizontal conspiracy among dealers to prevent sales to discounters. In concurring Mr. Justice Harlan wrote, "In my opinion, . . . General Motors is not precluded from enforcing the location clause by unilateral action, and I find nothing in the Court's opinion to the contrary." *Id.* at 149. In our own Circuit, the District Court on remand expressly provided that "[n]either the injunctive provisions of this Final Judgment nor any provision thereof shall be construed to enjoin General

[20] "We need not reach these questions concerning the meaning, effect, or validity of the 'location clause' or of any other provision in the Dealer Selling Agreement, and we do not. We do not decide whether the 'location clause' may be construed to prohibit a dealer, party to it, from selling through discounters, or whether General Motors could by unilateral action enforce the clause, so construed." *United States v. General Motors Corp.*, 384 U.S. 127, 139-40 (1966).

Motors from acting unilaterally under any Chevrolet dealer franchise agreement or from unilaterally enforcing any such agreement [including the location clause]," except as provided in a six months prohibition relating to sales to discounters.[21] *United States v.*

[21] Another case, *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), dealt similarly with locations clauses. Although *Topco* involved horizontal rather than vertical limitations, the District Court, on remand, expressly allowed the defendant to fix the locations of his licensees, except where doing so would give an exclusive territory to another licensee. The District Court's Judgment provided:

> ". . . nothing in this Final Judgment shall prevent defendant . . . (2) from designating the location of the place or places of business for which a trademark license is issued, provided that the defendant shall not refuse to grant a trademark license to any member or withdraw a license from any member, except any withdrawal incidental to the bona fide termination of any member firm's membership in Topco, *if such action would achieve or maintain territorial exclusivity in any member firm.*" *United States v. Topco Associates, Inc.*, 1973 Trade Cas. ¶74,391 (N.D. Ill. 1973).

An appeal was taken from the judgment entered by the District Court, after remand, and this judgment was summarily affirmed, with only Mr. Justice Douglas dissenting, 414 U.S. 801 (1973).

The dissenting opinions written by my brothers Browning and Kilkenny rely heavily upon language from the Supreme Court's opinion in *Topco* for the sweeping and unqualified conclusion that, in Judge Kilkenny's words, "restricted intraband competition cannot be justified by alleged interbrand competitive gain." The majority believes that such a broad interpretation of *Topco* is plainly wrong. In *Topco* the Court held that the District Court had erred by applying a rule of reason to a horizontal restraint, which, the Court noted, is "[o]ne of the classic examples of a *per se* violation of §1." 405 U.S. at 608.

Thus, *Topco* stands only for the accepted proposition that a rule of reason may not be applied in circumstances wherein a *per se* violation has been clearly established. A vertical device, like the locations clause employed in the present case, is by no means a "classic example" of a *per se* violation. When, as here, the issue of *per se* liability has not been previously determined, *Topco* in no way precludes consideration of whatever gains in interbrand competition have resulted from intrabrand restrictions.

General Motors Corporation, Civil No. 62-1208-CC (S.D. Cal. Aug. 17, 1966).[22]

Two other Courts of Appeals have considered the legality of location clauses in the post-*Schwinn* era,

[22]Continental attempts to circumvent the precedent established by the *Schwinn, Topco,* and *General Motors* (*United States v. General Motors Corp.,* 384 U.S. 127 (1966)) orders on remand by arguing that the manufacturer's acknowledged right to "franchise by location" means only that a franchisor may authorize a dealer to hold himself out as the "authorized agent" of the franchisor only at certain locations. Thus, the argument continues, the right to "franchise by location" does not give the franchisor any right to prevent the franchisee from opening as many additional outlets as he wishes at unauthorized locations, and the franchisor must provide additional quantities of product and related services to the dealer at these locations. The "right to franchise by location" is construed to mean only that the franchisor may deny his franchisee the right to "hold himself out as the authorized agent" of the manufacturer at these additional locations.

We find the foregoing argument to be highly artificial and even spurious. The very fact that the television sets sold from the unauthorized location bear the Sylvania brand name implies to the public that the store is an "authorized Sylvania dealer", even if the store cannot expressly identify itself as such. The franchised Sylvania dealer has the advantage of company arranged credit, guaranteed company shipments. Sylvania's national advertising of the product, and his recognized name as a Sylvania dealer at his authorized locations. Any inherent advantages of being a Sylvania franchisee go with the dealer to the new location, regardless of whether he holds himself out at the new location as a franchised Sylvania dealer or not. The decree on remand in *Schwinn* expressly provided that nothing therein should prevent Schwinn "from designating in its franchise agreements the location of the place or places of business for which the franchise is issued," 291 F. Supp. 564, 566 (N.D. Ill. 1968). Continental would define "franchise", as applied to the facts here, to mean the right of a store at an unauthorized location to refer to itself in its advertisements or signs on the premises as an "authorized Sylvania dealer." It is obvious to us that the word, "franchise", should more logically be interpreted to mean the right to purchase television sets from Sylvania for resale, in conjunction with the above mentioned benefits; in essence, the right to act as a Sylvania dealer. Both the Schwinn and Sylvania franchises were agreements which authorized the dealer to sell the manufacturer's products from a specific location. The primary purpose of

and both have concluded that such clauses are valid. In *Salco Corporation v. General Motors Corporation, Buick Motor Division,* 517 F.2d 567 (10th Cir. 1975), a franchisee, relying upon *Schwinn,* contended that the location clause within the standard Buick Automobile dealer franchise agreement[23] was illegal *per se,* as a restraint of trade. The Tenth Circuit rejected this argument, noting with approval the Second Circuit's conclusion in *Boro Hall, supra,* that the right to franchise necessarily validated the type of location clause typically included in automobile franchise agreements. The court therefore concluded that a location clause is valid as a matter of law.

the franchises in both cases was to authorize the sale and display of the manufacturer's product, as part of an overall system of distribution.

Therefore, we read the above quoted language from the *Schwinn* decree on remand explicitly to authorize the practice followed by Sylvania, designating the location or locations from which a particular retailer was authorized to operate as the manufacturer's dealer. The term "franchise" in the *Schwinn* order on remand has been similarly interpreted by law review commentators. *See, e.g.,* Pollack, *Alternative Distribution Methods After Schwinn,* 63 Nw. U. L. Rev. 595, 603-04 (1968):

> "Nor does the *Schwinn* doctrine outlaw the use of the so-called 'location clause', which designates the location of the place of business for which a franchise is issued and which requires the franchisor's consent to operate the business at another location. . . . Indeed, without some such agreement, it is difficult to see how a franchise relationship could operate. . . . Subsequently in his final decree in the *Schwinn* case on remand from the Supreme Court, Judge Perry specifically authorized Schwinn's use of location clauses in its franchise agreements."

[23]The location clause involved in *Salco* provided:

> "Once dealer is established in facilities and at a location . . . mutually satisfactory to Dealer and Buick, Dealer will not move to or establish a new or different location . . . without prior written approval of Buick."

517 F.2d at 575 n.7.

"There is nothing in the complaint, nor for that matter in the facts subsequently developed by Denver Buick in opposition to the General Motors' summary judgment motion on the First Claim for Relief, indicating that General Motors did anything other than simply assert its rights under the terms of the clause by insisting on the right to approve a new location for Denver Buick. There is no allegation that General Motors assigned territories outside of which dealers could not sell, and in fact the appellant admits otherwise (Br. 57). Accordingly, the Section 1 allegations were properly dismissed, since the location clause is valid as a matter of law, and there are no allegations that would amount to an unlawful use of the clause."

517 F.2d at 576.

In the present case, like *Salco* and unlike *Schwinn, Sylvania* did not assign discrete selling territories outside of which the dealers were not permitted to sell. The dealer could sell to anyone who came to his approved location. Indeed, in terms of the wording of the location clause involved and its potential competitive effect, we find *Salco* to be virtually indistinguishable from the case before us.

In *Kaiser v. General Motors Corp.*, ... F.2d ..... (3d Cir. Feb. 10, 1976), *aff'g* 396 F. Supp. 33 (E.D. Pa. 1975), the Third Circuit affirmed a District Court's order granting summary judgment in favor of a manufacturer against a challenge that a location clause in its franchise agreement was illegal under the Sherman Act. The District Court expressly found nothing in *Schwinn* that makes location clauses illegal.

Looking beyond the cases dealing with location clauses, we find numerous decisions that, while applying *Schwinn,* have not interpreted *Schwinn* as establishing a *per se* rule against all vertical territorial restraints.[24] A variety of vertical territorial and customer restraints have been upheld under the rule of reason test,[25] and some of these restraints were far

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[24]The tendency of the courts to construe the *Schwinn* holding narrowly has been the subject of law review discussions. *See* Note, *Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?,* 40 Geo. Wash. L. Rev. 123 (1971); Note, *Vertical Territorial and Customer Restrictions Under the Sherman Act: Decisions Since United States v. Arnold, Schwinn & Co.,* 22 J. Pub. L. 483 (1973).

[25]While a locations clause is a common tool utilized by manufacturers in their distributorship or franchise arrangements, it is by no means the only vertical restraint that has been employed to subject a distributor or retailer of products bearing a recognized trade name to certain controls over his business operations. These other controls on dealer territorial expansion include such practices as exclusive dealerships, area of primary responsibility covenants, and profit pass-over requirements. Each of these vertical restraints might limit intraband competition, and all are susceptible, linguistically, to inclusion within the literal language of *Schwinn;* nevertheless all have been upheld against claims that they fall within *Schwinn's per se* rule of prohibition. *See Colorado Pump & Supply Co. v. Febco Inc.,* 472 F.2d 637 (10th Cir.), *cert. denied,* 411 U.S. 987 (1973) (primary responsibility clause); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 76 (9th Cir. 1969), *cert denied,* 396 U.S. 1062 (1970) (exclusive dealership); *Superior Bedding Co. v. Serta Associates, Inc.,* 353 F. Supp. 1143 (N.D. Ill. 1972) (primary responsibility and profit pass-over clauses); *Plastic Packaging Materials, Inc. v. Dow Chemical Co.,* 327 F. Supp. 213 (E.D. Pa. 1971) (primary responsibility clause); *but cf. Reed Brothers, Inc. v. Monsanto Company,* ..... F.2d ..... (8th Cir. May 22, 1975) (recognizing that courts have approved designation of areas of primary responsibility "without more", but holding that there was "more" in Monsanto's additional policies that effectively curtailed the ability of its distributors to sell Monsanto Herbicides, after purchase, to whomever they wished).

A primary responsibility clause is basically an agreement obligating a distributor to concentrate his sole efforts in a specified geographical area for which he is primarily responsible. The use of these clauses was endorsed in *White Motor Co. v. United*

more burdensome than the location clause which is here at issue. *See Anderson v. American Automobile Association,* 454 F.2d 1240, 1246 (9th Cir. 1972); *Tripoli Company, Inc. v. Wella Corp.,* 425 F.2d 932, 936 (3d Cir.), *cert. denied,* 400 U.S. 831 (1970);[26] *Janel Sales Corp. v. Lanvin Parfums, Inc.,* 396 F.2d

States, 372 U.S. 253 (1963), by Mr. Justice Brennan, who noted in his concurring opinion that the lawfulness of area of primary responsibility covenants has been recognized in many consent decrees. (372 U.S. at 271 n. 12).

A profit pass-over arrangement requires a dealer who makes sales within the territory of another dealer to turn over part of his profits from those sales to that other dealer, to compensate the other dealer for the latter's promotional efforts in the territory wherein the sale occurred. Mr. Justice Brennan also discussed this type of restriction in *White Motor Co., supra,* noting "[i]f, for example, such a cross-sale incurs only an obligation to share (or 'pass-over') the profit with the dealer whose territory has been invaded—as is most often, and apparently here, the case—then the practical effect upon competition of a territorial limitation may be no more harmful than that of the typical exclusive franchise—the lawfulness of which the Government does not dispute here." 372 U.S. 253, 270-71 (Brennan, J., concurring).

[26]The Third Circuit, sitting *en banc,* held in *Tripoli* that a cosmetic manufacturer's restriction on its distributor's resale of products, intended for professional use, to non-professionals was not a *per se* violation of the Sherman Act, although the challenged practice fell within the *Schwinn* language pertaining to restrictions on resale after title to the product passes to the distributor. The court applied the rule of reason and held the restrictions reasonable as a means of protecting the public from potential harm. The court chose to restrict *Schwinn* to its facts, stating:

> "That case [*Schwinn*] does not, as plaintiff proposes, establish as a per se violation every attempt by a manufacturer to restrict the persons to whom a wholesaler may resell any product whatsoever, title to which has left the manufacturer. Rather, *Schwinn* must be read, as must all antitrust cases, in its factual context." 425 F.2d at 936 (3rd Cir. 1970).

More recently, the Third Circuit has suggested that the principle established in *Tripoli* may not be limited to health and safety justifications, but may extend to encompass the broader proposition that ". . . where a manufacturer's restriction is related to a legitimate business purpose, Schwinn may be inapplicable." *Scooper Dooper, Inc. v. Kraftco Corp.,* 494 F.2d 840, 847 n.13 (3rd Cir. 1974).

398, 406 (2d Cir.), *cert. denied,* 393 U.S. 938 (1968); *Carter-Wallace, Inc. v. United States,* 449 F.2d 1374, 1380 (Ct. Cl. 1971); *National Dairy Products Corp. v. Milk Drivers & Dairy Employees Union Local 680,* 308 F.Supp. 982 (S.D.N.Y. 1970); *La Fortune v. Ebie,* 1972 Trade Cas. ¶74,090 (Calif. Ct. App.). *See also Good Investment Promotions, Inc. v. Corning Glass Works,* 493 F.2d 891 (6th Cir. 1974).

In the light of the cases upholding the legality of location clauses and the fact that the decree on remand in *Schwinn* expressly permitted manufacturers to designate the location for which a franchise is issued, it is hardly surprising that *Schwinn* has been interpreted by learned commentators as leaving undisturbed the basic legality of location clauses.[27] Moreover, years after *Schwinn,* the Department of Justice refused to characterize location clauses as illegal *per se,* treating them instead as restrictions to be governed by the rule of reason.[28]. And only last year, a spokesman for the Antitrust Division stated that locations clauses "are not illegal standing by themselves" since "[t]hey reflect the manufacturer's legitimate interest in having his goods distributed efficiently throughout

[27]*See* Jentes, *Permissible Vertical Restraints in Manufacturer-Distributor Relations,* 8 A.B.A. Antitrust Law Notes 97, 102 (Summer 1972), in which the author advises that a location clause is not only legal, but a *preferred* type of manufacturer restraint under *Schwinn. See also 1968 Antitrust Law Symposium of the New York State Bar Association,* 62-64; Pollack, *Alternative Distribution Methods After Schwinn,* 63 Nw. U.L. Rev. 595, 603-4 (1968); Hanson, *American Bar Association Symposium on Marketing and Franchising: Antitrust Prognosis for the 70's,* 39 Antitrust L.J. 502, 516 (1970).

[28]*See* Robinson, *Recent Antitrust Developments—1974,* 75 Colum. L. Rev. 243, 276 n.207 (1975).

a particular area." Address by K. Clearwaters before the International Franchising Association, *Franchising and the Antitrust Laws,* May 16, 1974. The Federal Trade Commission has also recognized that *Schwinn* did not establish a *per se* rule against vertical territorial restrictions. In its Report of the Ad Hoc Committee on Franchising, the Commission reached the conclusion that:

> ". . . in *Schwinn,* the Court left enough leeway in its initial threshold test of the overall reasonableness of vertical arrangements to enable a manufacturer to justify such an arrangement by establishing that it could not have entered the market or expanded its market share . . . ."

FTC, Report of the Ad Hoc Committee on Franchising 30 (June 2, 1969). *See, Coca Cola Co.,* 3 CCH Trade Reg. Rep. ¶ 21,010 (Oct. 8, 1975) (Sustaining a soft drink manufacturer's imposition of exclusive territories upon licensed bottlers).

In summary, when *Schwinn* is analyzed in its factual context it is readily distinguishable from the case before us, in terms of both the kind of restrictions involved and their operative competitive effect. This conclusion is reinforced by reference to the *Schwinn* decree on remand, *Boro Hall, Salco,* and *Kaiser,* all of which uphold location clauses like the one before us now. Finally, in both the cases decided after *Schwinn,* involving other types of vertically imposed customer and territorial restraints, and the post-*Schwinn* pronouncements of the Federal Trade Commission and Antitrust Division of the Department

of Justice, we see a clear trend against interpreting *Schwinn* as establishing a per se rule of illegality, indiscriminately invalidating all vertical territorial restraints without any consideration of their reasonableness in terms of their overall competitive effect.

B. *The Exclusive Dealership Precedents*

The validity of the trial judge's decision to apply a rule of *per se* illegality to Sylvania's locations practice is further undermined by the many authorities upholding a manufacturer's right to grant "exclusive dealerships", a practice much more restrictive of competition than Sylvania's location clauses. In an exclusive dealership arrangement a manufacturer agrees with a dealer not to authorize any competing dealers to sell the manufacturer's products anywhere within the exclusive territory of the first dealer. There is a veritable avalanche of precedent to the effect that, absent sufficient evidence of monopolization, a manufacturer may legally grant such an exclusive franchise, even if this effects the elimination of another distributor. *See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970); *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.,* 459 F.2d 138 (6th Cir. 1972); *Scanlan v. Anheuser Busch, Inc.,* 388 F.2d 918 (9th Cir. 1968), *cert. denied,* 391 U.S. 916 (1968); *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 323 F.2d 1, 7 (9th Cir. 1963), *cert. denied,* 385 U.S. 976 (1966); *Ace Beer Distributors, Inc. v. Kohn, Inc.,* 318 F.2d 283 (6th

Cir.), *cert. denied,* 375 U.S. 922 (1963); *Packard Motor Car Co. v. Webster Motor Car Co.,* 243 F.2d 418 (D.C. Cir.), *cert. denied,* 355 U.S. 822 (1957); *Interborough News Co. v. Curtis Publishing Company,* 225 F.2d 289 (2d Cir. 1955); *Naifeh v. Ronson Art Metal Works,* 218 F.2d 202 (10th Cir. 1954); *Bascom Launder Corp. v. Telecoin Corp.,* 204 F.2d 331 (2d Cir.), *cert. denied,* 345 U.S. 994 (1953); *Fargo Glass & Paint Co. v. Globe American Corp.,* 201 F.2d 534 (7th Cir.), *cert. denied,* 345 U.S. 942 (1953); *Potter's Photographic Applications Co. v. Ealing Corp.,* 292 F.Supp. 92 (E.D.N.Y. 1968); *L.S. Good & Co. v. H. Daroff & Sons, Inc.,* 279 F.Supp. 925 (N.D. W.Va. 1968); *Peerless Dental Supply Co. v. Weber Dental Manufacturing Co.,* 283 F. Supp. 288 (E.D. Pa. 1968); *Top-All Varieties, Inc. v. Hallmark Cards, Inc.,* 1969 Trade Cas. ¶72,850 (S.D.N.Y.). *See generally* Note, *Restricted Channels of Distribution Under the Sherman Act,* 75 Harv. L. Rev. 795 (1962).

The clearly established legality of exclusive dealerships logically compels the conclusion that location clauses cannot be *per se* illegal. If it is legal for a manufacturer to promise one dealer that he will have the exclusive right to sell the manufacturer's products within a designated territory, then obviously it is legal for that manufacturer to keep his promise of exclusivity by denying other dealers like Continental the power to sell from retail outlets at unauthorized locations within the first dealer's exclusive territory. The accepted principle that a manufacturer may legally grant an exclusive dealership is rendered meaningless if he cannot legally use a location clause to prevent his other dealers from opening their own retail outlets in the same area. If a manufacturer cannot include a location restriction in a franchise agreement, he cannot do what the exclusive dealership cases hold is legal, i.e., promise that "I will not franchise another dealer in your area." If a location restriction cannot legally be enforced, and, for example, a franchise is established in San Francisco, California, who then opens a store in Los Angeles, California, the manufacturer cannot fulfill his promise to his original Los Angeles franchisee that he will not recognize another dealer in Los Angeles. Therefore, we conclude that the rule of *per se* illegality applied below is logically inconsistent and irreconcilable with our decision in *Hawaiian Oke* and the many other cases upholding the right of manufacturers to establish exclusive dealerships.

If the rule adopted by the trial judge in this case were the law, it would have grievous implications for the common and established practices of franchising[29] and the granting of exclusive dealerships. Under the district judge's approach a manufacturer legally prevented from imposing or enforcing a location restriction could not lawfully prevent its franchisee from creating new outlets at any unauthorized locations the franchisee might choose and distributing the franchisor's merchandise therefrom. In other words, un-

[29] According to the Department of Commerce, there were 445,281 franchised businesses in the United States in 1972. U.S. Dept't. of Commerce, Franchising in the Economy 1972-1974 (1974).

der the rule of *per se* illegality, *if a dealer is franchised anywhere he is franchised everywhere.* Once the manufacturer has granted a franchise for any location, he would be legally obligated to enable the franchisee to sell the manufacturer's product from all other locations into which the franchisee might wish to expand, regardless of the prejudicial effect that this would have on existing distribution in those areas.[30]

[30]It has been argued that if, under *Schwinn*, Sylvania could not legally prevent Continental from selling to another unfranchised retailer, who thereupon resells from an unauthorized location, then there is no reason why Continental could not sell to itself (by shipping television sets to unauthorized locations for resale there). It may be true that any attempt by Sylvania to restrict sales by its franchises to unfranchised dealers would constitute a violation of the antitrust laws. However, Sylvania was careful to avoid this problem by allowing its dealers to sell to anyone. Allowing a franchised dealer to sell to a non-franchised retailer has a far different effect upon the franchiser than allowing a franchisee, in violation of a contract, to open a store at any location he chooses. The unfranchised retailer would ordinarily, in the first instance, pay a higher price for the Sylvania product because the unfranchised dealer would be buying through a middleman, the franchised dealer, rather than directly from Sylvania. On the other hand, as we have previously emphasized, the franchised dealer has the benefit of company arranged credit, guaranteed company shipments, and a recognized name as a Sylvania franchisee, as well as the advantage of buying directly from the manufacturer at a lower price. And all advantages of the status of a Sylvania franchisee attend the dealer's move to the new location, regardless of whether he holds himself out at the new location as a franchised Sylvania dealer. The franchised dealer who violates the company's elbow room policy still will retain all the benefits of his franchise, while eliminating the benefits to the company of having a reliable market, and spaced distribution. The ultimate economic result of the approach below would likely spell the doom of all Sylvania franchised dealers. No longer could Sylvania offer to its dealers the primary advantage of a promise not to franchise more dealers than a particular market could reasonably support. This promise on Sylvania's part was not nearly as restrictive as an exclusive dealership, which our court and many others have upheld, but it did tend to prevent the kind of "cut-throat" competition between franchisees that could ultimately result in the destruction of Sylvania as an interbrand competitor. The elbow room policy was never used by Sylvania severely to restrict intrabrand competition or to divide markets. No dealer had a veto power over the entry of other dealers into his area, and locations were authorized by Sylvania solely on the basis of market expandability.

Taking another approach, Continental also argues that "Continental sold in Sacramento not 'to itself', but to an 'unfranchised dealer', namely, to S.A.M. Industries, Inc." In fact, the record thoroughly belies this contention and conclusively demonstrates that Continental was indeed shipping to itself in Sacramento because S.A.M. Industries, Inc., was not a separate, independent dealer.

In the original Answer and Counterclaim, Continental (including S.A.M.) alleges that it, as a group of affiliates, did business in California under the firm name and style of "Continental T.V." Throughout its Answer S.A.M. and the other affiliated corporations referred to themselves, collectively, as "Continental." In his statements to the jury, Continental's attorney made it clear that S.A.M. was a part of Continental, and that the Sacramento store operated by S.A.M. was doomed to be a link in the Continental chain. The testimony of George Shahood, the President and General Manager of Continental T.V. also shows that the Sacramento store was part of Continental T.V.'s whole enterprise. Finally, and as the irrefutable answer to Continental's alternate approach, the district judge found as a fact that "Cross claimants are a group of affiliated corporations in substantially common ownership which did business under the name 'Continental T.V.' George Shahood and his wife were the principal owners of all the corporations and Mr. Shahood was the principal operating officer."

The adoption of the rule of *per se* illegality in a case such as this would undoubtedly hasten the disappearence from the American marketplace of the small independent merchant, now often a franchisee, and already an endangered entrepreneur. The Supreme Court has recognized the concern that Congress has expressed over the disappearance of the small independent merchant due to competition with much larger, vertically integrated firms. In the words of Mr. Justice Stewart,

> ". . . franchising promises to provide the independent merchant with the means to become an

efficient and effective competitor of large integrated firms. Through various forms of franchising, the manufacturer is assured qualified and effective outlets for his products, and the franchisee enjoys backing in the form of know-how and financial assistance. These franchise arrangements also make significant social and economic contributions of importance to the whole society, as at least one federal court has noted:

> 'The franchise method of operation has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs . . . . If our economy had not developed that system of operation these individuals would have turned out to have been merely employees. The franchise system creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain.'[31]

¶ Indiscriminate invalidation of franchising arrangements would eliminate their creative contributions to competition and force 'suppliers to abandon franchising and integrate forward to the detriment of small business. In other words, we may inadvertently compel concentration by misguided zealousness. As a result, '[t]here [would

[31] Quoting *Susser v. Carvel Corp.*, 206 F. Supp. 636, 640 (S.D. N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964) *cert. granted*, 379 U.S. 885, *cert. dismissed*, 381 U.S. 125 (1965).

> be] less and less place for the independent.' *Standard Oil Co. v. United States*, 337 U.S. 293, 315 (separate opinion of MR. JUSTICE DOUGLAS). 'The small, independent businessman [would] be supplanted by clerks.' *Id.*, at 321."

United States v. Arnold, Schwinn & Co., 388 U.S. at 386-87 (Stewart, J., concurring and dissenting) (footnotes omitted).

If we were to adopt the approach of *per se* illegality, the ultimate result might be to undermine franchising as a tool to enable the small, independent businessman to compete with the large vertically integrated giants of many industries. One danger would be that a single franchisee, allowed to expand into a chain of stores and sell everywhere over the manufacturer's objection and in violation of the contract, might make it impossible for other small single-outlet franchisees of the same manufacturer to compete effectively. Thus the loyal network of small independent businessmen that the manufacturer desired for his franchisees might be supplanted by several "giant" franchisees, each having numerous outlets. Another risk would be that a small manufacturer who could not afford to integrate vertically, if prohibited from offering any degree of territorial protection from intrabrand competition or "elbow room", might not be able to attract dealers and thus might be unable to establish an effective system of distribution for its product. We cannot believe that Congress intended to implement a rigid *per se* rule of illegality that portends such serious risk to franchising arrangements,

methods that have made significantly worthy contributions to our Nation's economy.[32]

C. *The Policy of the Sherman Act*

A final reason for our conclusion, and perhaps the most compelling one, is our belief that location agreements like the ones adopted by Sylvania may in some instances *promote,* rather than impede, competition. Consequently, we think that there must be a case by case inquiry under the "rule of reason" to determine the competitive effect of such restraints if the policy of the Sherman Act is to be effectuated. The true anticompetitive evil of the restraints which *Schwinn* declared to be illegal *per se* was their total proscription of all competition between *Schwinn* dealers for the same customers or within the same geographical areas. Here, Sylvania's practice involved no such total destruction of intrabrand competition.[33] Implicit in the application of a *per se* rule in antitrust analysis is the conclusion that the challenged practice necessarily and always involves an unreasonable restraint upon competition,[34] and thus can be conclusively pre-

[32] *See generally* H. Brown, Franchising—*Realities and Remedies* (1973); Small Business Administration for Senate Select Committee on Small Business, 92 Cong., 1st Sess., Report on the Economic Effects of Franchising (Comm. Print 1971); E. Lewis & R. Hancock, The Franchise System of Distribution (1963); Zeidman, *The Growth and Importance of Franchising—Its Impact on Small Business,* 12 Antitrust Bull. 1191 (1967).

[33] *See* text accompanying notes 14 to 18 *supra.*

[34] "Specifically, the *per se* rule of prohibition has been applied to price fixing agreements, group boycotts, tying arrangements, and horizontal division of markets. As to each of these practices, experience and analysis have established the utter lack of justification to excuse its inherent threat to competition. To gauge the appropriateness of a *per se* test for the forms of restraint involved in this case, then, we must determine whether experience warrants, at this stage, a conclusion that inquiry into effect upon competition and economic justification would be similarly irrelevant." *White Motor Co. v. United States,* 372 U.S. 253, 265-66 (1963) (Brennan, J., concurring) (footnotes omitted). *See* generally von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law,* 11 U.C.L.A.L.Rev. 569 (1964).

sumed to be illegal without any inquiry into the nature and history of the industry involved and a determination of the precise manner in which a particular restraint has affected competition. Harsh and inflexible *per se* rules should be applied when, and only when, a court has made a threshold examination of the economic effects of the challenged practice and has determined that it is clear that the practice to be declared illegal *per se* has had a "pernicious effect on competition" and a "lack of any redeeming virtue." *See Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 5 (1958).

On the record before us Continental has not proved that the enforcement by Sylvania of its location clause has worked a net anticompetitive effect, or that the facts presented in this one case warrant the conclusion that further inquiry into the economic impact of Sylvania's location clauses upon competition would be irrelevant. We recognize, of course, that in establishing a locations practice, Sylvania did check intrabrand competition to some extent. This was an inevitable incident to Sylvania's attempt to promote and maintain interbrand competition. However, to ignore Sylvania's ultimate purpose, to remain in the market as a viable competitor; thereby fostering interbrand competition, and to consider only the fact

that its practice slightly limited intrabrand competition, is to overlook the forest while watching the trees.[35] The free market policy of the antitrust laws would not be served by fashioning rules which foster intrabrand competition to the point of extinguishing interbrand competition. This would lead to the more insidious evil of total monopolization. In this connection, it is important to emphasize the following considerations: that in a market dominated by a single company (RCA), Sylvania possessed only a minor fraction of the total market, that many other brands were available to the consumer, that Sylvania dealers possessed no veto power against the franchising of additional dealers in any given area, that Sylvania dealers could and did carry competing brands, and that the location restriction on Sylvania dealers had no demonstrable effect on prices, volume of products available, quality, or consumer choice. Additionally, in no market did Sylvania's practice foreclose any consumer from substantial choice among several Sylvania dealers, and any Sylvania dealer who might have been inclined to set his prices too high or to pro-

[35]As one economist has explained the principal point in the course of an analysis of the economic effects of restrictive distribution arrangements:

> "Restrictive marketing arrangements of any sort thus limit competition in some respect. However . . . limitations on competitive activity in one direction *may* strengthen competitive forces in another . . . The question for analysis . . . is whether this departure from competitive structure within one marketing organization is counterbalanced by an increase in the number of marketing organizations and products available in particular markets or in the vigor of competitive behavior." Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards*, 30 Law. & Contemp. Prob. 506, 508 (1965).

vide inadequate service would run headlong into both strong interbrand competition from other manufacturers and intrabrand competition from one or more other Sylvania dealers.

Where, as here, it cannot be said with certainty that a challenged practice is inherently anticompetitive and unreasonable, the standard commonly referred to as the "rule of reason" is, and should be applied. That rule, read into the Sherman Act in *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911), was stated in its classic form by Mr. Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

Id., at 238.

In holding that an instruction incorporating the "rule of reason" should have been given to the jury, we note that Sylvania presented substantial evidence from which the jury might have reasonably concluded that Sylvania's location practice, rather than unreasonably restricting competitive market forces, actually had a procompetitive effect[36] in that it enabled a marginal producer to achieve the status of a viable competitor in an industry threatened by oligopolistic

[36]Lee Egan Preston, Jr., a professor at the School of Management at the State University of New York in Buffalo, testified as to his conclusions after a study of the television market:

"A. Now, since Sylvania occupies a relatively small position in the television market and it is therefore a competitive element in that market, I think the television market would be less competitive if Sylvania would be out of it, because the number of brands, after all, are 10 to 12.

Sylvania is in there. They are at the bottom, but in there.

Now, if we squeeze out the bottom firms from that market, then I think we would see a decline in competition among brands in all the major markets in the country. Therefore, if this distribution policy or any particular distribution policy has the effect of strengthening Sylvania or any other smaller firm as a competitive force among the other firms in that market, many of which are much larger, then I think we have to look carefully at that policy as an element in competition, indeed as a procompetitive policy among the brands and the manufacturers as a whole.

Q: In the opinion which you have just described for us, sir, did you ascertain whether the type of distribution policy that you have assumed to be employed was in any way beneficial to competition in the sense beyond the one you have just given?

A: I think I just responded to that by saying that I think that anything that maintains a range of competition alternatives throughout the market strengthens competitive forces there."

• • •

"Q: Assuming a distribution practice of the type that you are asked to assume, is there any anticompetitive characteristics that you can identify?

A: I don't see any, because I feel that competition in the market has resulted from the large number of brands and dealers available throughout the system." *Compare* Preston, *supra* note 35 at 506.

tendencies. It may be true, as Sylvania claimed, that the location restrictions employed by Sylvania attracted dealers to carry and promote Sylvania's products, and ultimately fortified its market position in competition with other brands. Perhaps some limit on ruinous intrabrand competition was necessary to induce a sufficient number of otherwise reluctant dealers to sell the Sylvania product. It is undisputed that, as we have previously noted, Sylvania's share of the market increased from less than 2% in 1962 to 5% by 1965. Any reduction of intrabrand competition that may have resulted from the locations practice apparently did not eventuate in the evils that are normally associated with an unreasonable restraint of trade, since the television industry as a whole experienced both an increase in volume and a decrease in price during this period.[36a] Whether some diminution in intrabrand competition is justified when it averts the loss of one competitor in an industry that is already oligopolistic should ultimately be a question for the finder of the facts. Our choice of a rule of reason test over a *per se* rule of illegality means only that the critical policy question will at least be asked and answered.[37] In our view, the Sherman Act demands no less.

[36a]*See* Note, 53 Texas L. Rev. 127, 136 (1974).

[37]A number of justifications have been offered for vertically-imposed territorial restraints, a few of which can be briefly summarized. We express no view as to the validity of these justifications, either as a matter of abstract economic theory or in the context of the specific facts of this case. As previously indicated, under the rule of reason the ultimate question must be answered by the trier of fact.

Perhaps the major justification offered for such restrictions is that they enable a manufacturer to obtain access to markets that

Chief Justice Hughes once wrote, in discussing the Sherman Act: "The restrictions the Act imposes are

are otherwise closed to him. It is altogether probable that distributors will be unwilling to handle a manufacturer's product unless they are afforded some protection against ruinous intrabrand competition. Dealers could justifiably believe that in the absence of vertical restrictions, "cutthroat" intrabrand competition from other dealers would drive down prices and render their operation unprofitable, and endanger their capital investment.

A second argument in favor of vertical restrictions is the so-called "free ride" theory. Vertical restrictions are said to be necessary to prevent dealers from invading the territories of other dealers by choosing to rely on the promotional efforts of those other dealers rather than undertaking costly selling activities themselves. It is argued, with significant logic, that in the absence of vertical territorial restrictions, dealers will not provide advertising or repair facilities as extensively as they would if they could be assured that invading dealers will not pirate the benefits of these promotional activities.

A third asserted justification for vertical restrictions is that they encourage total sales effort on a dealer's part by facilitating more concentrated and intense coverage of each geographic market, thus leading to increased sales of the manufacturer's products. Sales to large customers located close to the dealer usually require lower distribution costs than sales to smaller more distant customers. Accordingly, the manufacturer benefits if all customers are charged an identical price and the dealer's savings from sales to the choice customers offset the higher costs incurred in sales to others. Vertical territorial restrictions are thus often designed to motivate dealers to increase their depth of coverage in narrowly defined areas rather than "skimming" choice customers over a wider area.

A fourth major justification for the legality of vertical restraints is that they are necessary incentives to motivate dealers to provide a high quality and character of dealer services, such as consumer credit, prompt and efficient repairs, and other post-sale services. The theory is that dealers can be persuaded, and are willing, to provide these better services in exchange for some insulation from ruinous intrabrand competition.

For a more detailed discussion of these justifications and others, *see* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 75 Yale L.J. 373, 430-453 (1966); Comanor, *Vertical Territorial and Customer Restrictions: White Motor and its Aftermath,* 81 Harv. L. Rev. 1419, 1426-33 (1968); Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards,* 30 Law. & Contemp. Prob. 506, 511-12 (1965).

not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 360 (1933).[38] In holding that the just result in the present controversy is not absolutely foreordained by *Schwinn,* and that a rule of reason analysis should have been applied we believe and hope that we further the Sherman Act's goal of protecting the consumer from the dangers that result when free competition is suppressed. Since the legislative intent underlying the Sherman Act had as its goal the promotion of consumer welfare,[39] we decline blindly to condemn a busi-

[38]In the words of the present Solicitor General of the United States, ". . . the inescapable fact is that an agreement which eliminates competition is basic to almost every productive unit consisting of more than a single person. The agreement may be spelled out or, more often, may be tacit, but, to the degree that coordination of the productive activities of persons is achieved, actual or potential competition must be eliminated." Bork, *supra* n.37 at 377 (1966). For a classic discussion cautioning against an overly literal construction of the Sherman Act, see the dissenting opinion of Mr. Justice Holmes in *Northern Securities Co. v. United States,* 193 U.S. 197, 400-411 (1904).

[39]A study of the legislative history of the Sherman Act "establish[es] conclusively that the legislative intent underlying the Sherman Act was that courts should be guided exclusively by consumer welfare and the economic criteria which that value premise implies." Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J. Law & Econ. 7, 11 (1966). The current Solicitor General also noted that:

> ¶"It is difficult to resist the conclusion that the most faithful judicial reflection of Senator Sherman's and his colleague's policy intentions was the rule of reason enunciated by Chief Justice White in the 1911 *Standard Oil* and *American Tobacco* opinions. There was in White's opinions as in Sherman's speeches the idea that the statute was concerned exclusively with consumer welfare and that this meant the law must discourage restriction of output without hampering efficiency. White appears also to have incorporated into his rule of reason those major rules of law which Sherman en-

ness practice as illegal *per se* because it imposes a partial, though perhaps reasonable, limitation on intrabrand competition, when there is a significant possibility that its overall effect is to promote competition between brands. If the application of the rule of *per se* illegality in this case were permitted to stand, Sylvania would inevitably be stripped of a tool which it claims enabled it to compete effectively with the few "giants" of the industry. Its market share might well shrink to the precarious level that existed prior to institution of its "elbow room" policy. It is altogether possible that foreclosing the competitive benefits of vertical agreements like the one here involved by means of a *per se* rule, without any inquiry into the possibility of an overall procompetitive effect in the relevant industry, might well signal the death of similarly situated manufacturers with small market shares in other industries.[40] If a *per se* rule of illegality is permitted to replace a genuine inquiry into the reasonableness and economic effect of business arrangements which, in reality, strengthen competition

visaged as implied by a consumer-welfare policy. The rules implied by the policy are alterable as economic analysis progresses, however. White clearly foresaw this and incorporated that principle of change into the rule of reason."

Id. at 47.

[40]We acknowledge that, as a matter of economic theory, there is a sharp divergence of opinion as to the alleged procompetitive effects of vertical territorial restrictions. Perhaps the classic exposition of the competing arguments appear in two discussions, one written by Solicitor General Bork, and the other by William Comanor. *Compare* Bork, *supra* n.37, *with* Comanor, *supra* n.37. We do not further summarize the major aspects of the competing views, inasmuch as our reasoning in the present case endorses neither of the views. We simply believe that the fact that a disagreement exists, and the corresponding possibility that the locations clauses involved here *may* have had a procompetitive effect,

and promote the Nation's economic welfare, the purpose of the Sherman Act is undermined. This would promote monopoly, hamstring free enterprise, and victimize our country's consumers. Hopefully, our conclusion in this case bars such subversion of the national welfare.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.[41]

renders wholly inappropriate the application of a *per se* rule of illegality. The ultimate consideration of the procompetitive merits of Sylvania's practice must be conducted under the rule of reason.

[41]Sylvania vigorously contends that even if its locations practice could be held to be illegal *per se* under *Schwinn*, then it should have had the benefit of an instruction on the "failing company" defense. We have hitherto quoted its proffered jury instruction in this respect. *See* note 11 *supra*. Sylvania argues that at the time its "elbow room" policy was instituted, Sylvania would have been compelled to abandon its television manufacturing business if it did not increase its share of the market in the manner that it did. The failing company defense has generally been applied to mergers or acquisitions which would otherwise violate the antitrust laws. *United States v. Greater Buffalo Press*, 402 U.S. 549 (1971); *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969); *International Shoe Co. v. FTC*, 280 U.S. 291 (1930); Hale and Hale, *Failing Firms and the Merger Provisions of the Antitrust Laws*, 52 Ky. L.J. 597 (1964); Connor, *Section 7 of the Clayton Act: The Failing Company Myth*, 49 Geo. L.J. 84 (1960). However, *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) indicates that the defense is also available in cases wherein a vertical restraint is being challenged. The Court in *Schwinn* clearly indicated its intent that the failing company defense, once shown, would then subject the case to the rule of reason and the *per se* rule would not be applicable. We requote the Court's remarks:

> "We first observe that the facts of this case do not come within the specific illustrations which the Court in *White Motor* articulated as possible factors relevant to a showing that the challenged vertical restraint is sheltered by the rule of reason, because it is not anticompetitive. Schwinn was not a newcomer, seeking to break into or stay in the bicycle business. It was not a 'failing company'."

388 U.S. at 374. However, because we have determined that the trial court erred in applying the *Schwinn* rule of *per se* illegality

Reversed and Remanded.[42]

KILKENNY, with whom BROWNING, DUNIWAY and WRIGHT concur in whole or in part.

With the majority factual statement so fraught with irrelevancies and weighted with factual issues decided adversely to appellant by the jury,[1] it is our firm

to Sylvania's locations clauses and that a new trial is therefore required, we find it unnecessary now to decide whether there was sufficient evidence to warrant instructing the jury on the failing company defense. For future guidance to the District Court, however, we think it presently appropriate to emphasize that even if a manufacturer is prosperous in its whole operation, the failing company defense is applicable if the company is failing in the manufacture and distribution of one of its significant products. In *Schwinn*, Mr. Justice Fortas wrote of the "product market." 388 U.S. at 382.

Similarly, our determination that the rule of *per se* illegality established in *Schwinn* is inapplicable to the Sylvania location practice challenged here also makes it unnecessary for us to consider the merits of Sylvania's argument that it had no reasonable basis for believing its practices violated the antitrust laws because the conduct in question occurred before the *Schwinn* decision.

[42]While the disposition of the present case was under consideration by the full court, a panel issued its opinion in *Noble v. McClatchy Newspaper*, ... F.2d ..... (9th Cir. Nov. 14, 1975). The majority here has no quarrel with the result reached by the *Noble* court; however, any language in the *Noble* opinion that may be inconsistent with any of the majority's language in the present case is hereby disapproved.

[1]In passing on whether or not to grant an injunction on the appellant's practices, the district court entered elaborate findings of fact which are in direct contradiction of many of the statements in the majority opinion. For example, footnote 30 of the majority opinion states that "[t]he elbow room policy was never used by Sylvania severely to restrict intrabrand competition or to divide markets. No dealer had a veto power over the entry of other dealers into his area, and locations were authorized by Sylvania solely on the basis of market expandability." However, in its 16th finding of fact the district court concluded that "the action of Sylvania [reducing Continental's credit line, cancelling Continental's orders, and cutting off all communication with Continental, among other things] was taken pursuant to the

belief that a separate statement would be helpful to a full understanding of the principal issue presented. We offer this at the risk of some repetition.

FACTS

By 1962, Sylvania's share of the television market had declined to approximately one or two percent. It then changed its methods in an effort to obtain a larger share of the market. Under its new policy, Sylvania abandoned distribution through wholesalers and decided to sell only to selected retailers who would promote the Sylvania brand. It is undisputed that title to the television sets passed to these retailers. This plan, by limiting the number of franchises in a given area, would reduce intrabrand competition among retailers and serve as an incentive to carry and promote its product. Sylvania called this the "elbow room policy" and believed that these methods would allow it to improve its competitive position. In fact, under this new policy, it increased its market share to 5% in 1965, and, so it claims, this increase permitted it to remain in the market. Sylvania neither restricted franchised retailers from carrying

contract, combination or conspiracy alleged by Continental and was part and parcel thereof and at the instance of Sylvania's co-conspirator Handy Andy; and as a result thereof Continental was prevented from selling its Sylvania brand products in its store in Sacramento." The district court also found that on September 7, 1965, Sylvania's area sales manager advised Continental's principal operating officer "that due to prior 'commitments' which Sylvania had with Handy Andy, it was impossible for Sylvania to franchise Continental in Sacramento." Needless to say, the findings of the district court are implicit in and grow out of the jury's general verdict and its affirmative response to the previously maintained special interrogatory.

other brands, nor did it require retailers to sell only to customers who lived within a particular territory. However, it did enforce location restrictions on its retailers and prohibited them from reselling its television sets from unauthorized locations.

Continental, one of Sylvania's largest retailers, is composed of a chain of retail stores. In 1965, it opened a new store in Sacramento, shipped sets from another store, and offered them for sale in that city in September, 1965. Sylvania concedes that it had an agreement with Continental under which it was prohibited from moving Sylvania brand merchandise to an unapproved location for resale, without Sylvania's prior approval. Sylvania refused to franchise the new store and, beyond question, hampered Continental's resale efforts in Sacramento. In this case, it is clear that Sylvania's purpose was to prevent more retail intrabrand competition in Sacramento, where most of its sales were by one important retailer.

As an outgrowth of this dispute, Sylvania set in motion a series of maneuvers which seriously affected Continental's ability to resell Sylvania's television sets. To that time, Continental's credit limitation with Sylvania had been $300,000.00. On September 16th, the credit limit was reduced to $50,000.00, at which time Sylvania cancelled pending orders and severed other friendly ties with Continental. About the same time, Sylvania demanded payment of accounts receivable, which had not been its practice in the past. The following October 13th, it cancelled Continental's franchise. On the same day, the company through

which Sylvania previously extended credit to Continental sued the latter to collect accounts which were allegedly due. Sylvania then accelerated the collection of the remaining indebtedness, repossessed all of Continental's Sylvania sets, attached its bank accounts and caused its main store and warehouse to be locked and closed. At about the same time, Sylvania notified Philco, another major supplier of Continental, of what it was doing.

Sylvania claims it acted for reasons unrelated to its locations policy and not in retaliation. However, it is manifest that some or all of these actions had something to do with the enforcement of the agreement to restrict locations. This follows since the jury was instructed:

> "Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion or control over the products sold to the dealer, *after having parted with title and risk to the products,* you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of Section 1 of the Sherman Act, *regardless of the reasonableness of the location restrictions.*" [Emphasis supplied.]

On the basis of the evidence and the quoted instruction, the jury answered the following special interrogatory in the affirmative.

> "Did Sylvania Electric Products, Inc., engage in a contract combination or conspiracy in restraint

of trade in violation of the antitrust laws with respect to location restrictions alone?"

There is no way of pinpointing the percentage of Sylvania's subsequent behavior that the jury attributed to enforcement efforts. However, it is obvious the jury concluded that Sylvania attempted to and did restrict Continental's business location pursuant to a contract, combination, or conspiracy in violation of the Sherman Act and to the damage of Continental.

Despite what is said on page one of the majority opinion, the district judge *did not* instruct the jury that Sylvania's practice of fixing by agreement the locations from which Continental was authorized to sell Sylvania products was illegal *per se* under § 1 of the Sherman Act. To the contrary, it is clear that the district judge presented to the jury the issue of whether Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which it exercised dominion and control over the product sold to the dealer after having parted with title and risk to the products, to restrict the territories in which the dealers may resell the merchandise.

The paragraph from the instructions quoted above is relied upon by the majority as a statement to the jury that location clauses are *per se* illegal. This is one of several interrelated paragraphs in the instructions dealing with the subject of territorial or customer restrictions. Standing alone, this paragraph requires proof both of a contract, combination, or conspiracy, and of an exercise of control by Sylvania

after title and risk had passed to the dealers. This and related paragraphs read together also clearly informed the jury that Sylvania would be liable only if it exercised its control to restrict the territories in which the dealers resold.[1a]

[1a] The pertinent instructions read:

"So too, concerted action in the form of dividing territories in which a dealer may resell merchandise purchased from the manufacturer without resale price maintenance constitutes a violation of the antitrust laws. That is to say, where a manufacturer, by means of a contract, combination or conspiracy, restricts the territories within which a dealer may resell merchandise purchased from the manufacturer, such a restriction is unlawful regardless of whether or not that restriction is good business practice from the manufacturer's point of view and is likely to assure adequate volume of profits. Any agreement, combination or conspiracy by which a manufacturer interferes with the ordinary and usual forces of competition to restrict the territories within which dealers may resell merchandise which they have purchased from the manufacturer or to keep one dealer from competing for customers or sales in a territory or area served by another dealer also constitutes a violation of the antitrust laws, whether or not the territories resulting seem reasonable or unreasonable.

"Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion or control over the products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of Section 1 of the Sherman Act, regardless of the reasonableness of the location restrictions.

"On the other hand, on this question of territorial or customer restrictions, you are instructed that a manufacturer, such as Sylvania, has a right, acting alone and independently for its own business interests, to select its customers, and for this purpose, the manufacturer may grant an exclusive 'franchise' to certain dealers to whom, alone, he will sell his products. Also, it is lawful for the manufacturer to designate the location or locations of the place or places of business for which said dealer or dealers are franchised. It is also lawful for the manufacturer to decline or refuse to grant a dealer's request for a franchise at different or additional locations." [Tr. 3446-48]

Counsel for both Sylvania and Continental so understood the instructions. In closing arguments Continental's counsel told the jury that Sylvania had committed a *per se* violation of the Sherman Act if Sylvania by conspiracy had imposed territorial or price maintenance restrictions on the resale of products purchased from Sylvania.[1b] Sylvania's counsel agreed, telling the jury that it was only required to decide whether Sylvania had fixed prices or controlled territories, which would be unlawful, or had franchised by location, which would be lawful.[1c]

THE CONSPIRACY

It is sufficient if the arrangement or combination is put together through the coercive tactics of the manufacturer alone. *Hobart Bros. Co. v. Malcolm T.*

[1b]Continental's counsel said:

"Ladies and Gentlemen, there are also types of antitrust cases, which this is, which are so pernicious, the policies are so pernicious to competition, so anti-competitive in their impact on our economy that the law states there is no possible way to justify them. And, ladies and gentlemen, the two restrictions involved in this case are such marketing, distribution restrictions: Territorial restrictions and price maintenance restrictions are what lawyers and courts call per se violations of the act if they are enforced by contract, combination or conspiracy.

"So despite what Mr. Popofsky told you in his opening argument, despite what Prof. Preston testified to on the stand, the facts are that it is only necessary in this case to find, number one, that Sylvania had a policy by which it restricted the territory in which and/or customers to which Continental could sell Sylvania products after it had purchased them from Sylvania.

"As a part of that distribution policy, Sylvania maintained minimum prices and enforced those minimum prices." [Tr. 3338]

[1c]Sylvania's counsel said:

"You will not be asked, as counsel pointed out, to make any decision about the reasonableness of the distribution

Gilliland, Inc., 471 F.2d 894 (CA5 1973). See also *Osborn v. Sinclair Refining Co.*, 324 F.2d 566, 573-574 n. 13 (CA4 1963), discussing *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960).

ISSUE

In its simplest form, the principal issue before us is whether the district court committed error in giving the mentioned instruction. The answer lies in the applicability of the *per se* rule stated in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), to the findings of the jury in this case.

DISCUSSION

I.

Nowhere in its elaborate opinion does the majority come to grips with the fundamental tenet of antitrust law established in *Schwinn*. The *Schwinn* Court made it absolutely clear that once a manufacturer has lost all control over the property, parting with title and risk, thereafter any effort on its part to restrict territory or persons to whom the property may be sold, whether by contract or by silent combination or understanding with the vendee, is a *per se* violation

practice or whether or not competition is or is not being bettered or furthered.

"You will be asked only to decide what is the true character of the Sylvania practice. Was it the character that Continental suggests? Did it really involve price-fixing on the one hand and control over territories on the other, or did it, as we suggest, involve no more than a franchise by location practice?

"If it is the latter we contend the instructions make it lawful. So you will be asked only to identify the character of the practice." [Tr. 3378]

of Section 1 of the Sherman Act. The language of the *Schwinn* Court in stating the issue of importance:

> "We are here concerned with a truly vertical arrangement, raising the fundamental question of the degree to which a manufacturer may not only select the customers to whom he will sell, but also allocate territories for resale and confine access to his product to selected, or franchised retailers. *We conclude that the proper application of § 1 of the Sherman Act to this problem requires differentiation between the situation where the manufacturer parts with title, dominion, or risk with respect to the article, and where he completely retains ownership and risk of loss.*" 388 U.S. 378. [Emphasis supplied.]

Here, it is conceded that Sylvania parted with title to, dominion over, and risk in connection with the television sets.

Speaking to the same subject, the *Schwinn* Court said:

> "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. . . . Such restraints are so obviously destructive of competition that their mere existence is enough. *If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale.*" *Id.* at 379 [Emphasis supplied.]

At this point, the Court emphasized that it was not prepared to adopt a *per se* rule which would prohibit

vertical restrictions of territory and all franchising in instances where the *manufacturer retained ownership of the goods* saying that such a rule might severely hamper small enterprises resorting to reasonable methods of meeting the competition of giants and of merchandising through independent dealers. After this observation, the Court went on to say:

> "But to allow this freedom where the manufacturer has parted with dominion over the goods—the usual marketing situation—*would violate the ancient rule against restraints on alienation and open the door to exclusivity of outlets and limitation of territory further than prudence permits.*" *Id.* at 380. [Emphasis supplied.]

Further emphasizing its ban against restraint on alienation of a product once full title had passed, the Court said:

> "*Where the manufacturer retains title, dominion, and risk* with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer, it is only if the impact of the confinement is 'unreasonably' restrictive of competition that a violation of § 1 results from such confinements, unencumbered by culpable price fixing." *Id.* at 380. [Emphasis supplied.]

It is only in these limited circumstances that the "rule of reason", so strongly urged by the majority, should be applied.

The majority suggests "that vertically imposed customer restrictions only" were involved in *Schwinn*

and that the Court's statements with reference to territorial limitations were dicta. It is clear that the majority in *Schwinn* thought otherwise. We quote:

> "We come, then, to the legal issues in this case. We are here confronted with challenged *vertical restrictions as to territory and dealers.* The source of the restrictions is the manufacturer." *Id.* at 372. [Emphasis supplied.]

Some earlier Supreme Court decisions did not attach a rule of *per se* illegality to restraints on alienation in the antitrust context. The *Schwinn* Court has radically changed this position. Again speaking to the prohibition against restraint on alienation in a vertical relationship, the Supreme Court said at page 382:

> *"Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a per se violation of § 1 of the Sherman Act."* [Emphasis supplied.]

To further clarify the breadth of the *Schwinn* decision, we quote from page 378:

> "[U]pon remand, the decree should be revised *to enjoin any limitation upon the freedom of distributors to dispose of the Schwinn products, which they have bought from Schwinn, where and to whomever they choose. The principle is, of course, equally applicable to sales to retailers, and* the decree should similarly enjoin the making of any sales to retailers upon any condition,

> agreement or understanding *limiting the retailer's freedom as to where and to whom it will resell the products."* [Emphasis supplied.]

The *Schwinn* Court assumed jurisdiction and not only spoke on the subject of territorial and personal restraints against alienation, but issued a directive to the district court on the type of injunctive restraints to be placed upon *Schwinn.*

From the foregoing, we can arrive at no conclusion other than that any type of restraint on alienation by a manufacturer over a distributor *or a retailer,* be it territorial or personal, after title and dominion have passed, is a *per se* violation of the Act.

II.

The majority urges that the rule *per se* illegality established in *Schwinn* would not be applied to location restriction as utilized by Sylvania. It is forcefully argued that the location clauses here involved should be judged under what is commonly referred to as the "rule of reason," rather than a rule of *per se* illegality. As we see it, the majority's "critical and very obvious distinctions" between the restrictions in *Schwinn* and those of Sylvania are insignificant. The district court in the present case did not extend *Schwinn* to location clauses by "applying a bit of the literal language of *Schwinn* without reference to its context or the specific facts of that case. . . ." The court simply took the holding of *Schwinn* at face value and applied it to a set of facts which it logically encompasses

It is argued that in *Schwinn* a wholesaler-distributor was foreclosed from selling Schwinn products to any purchaser located outside his *exclusive* territory, and it is thus distinguishable. But, essentially the same thing can be said of the retailer in *Sylvania*. *Schwinn* defined the territorial boundaries within which each distributor could resell. Sylvania specified the precise location from which its retailer could resell. The Schwinn distributor was prohibited from selling beyond the boundaries of his territory. The Sylvania retailer is prohibited from reselling from any location not designated by the manufacturer. Schwinn had a territorial line fixed geographically. Sylvania has a territorial line fixed by the economic limitations upon an effective marketing area. While it is true that the Sylvania territorial line may not be as clearly defined as that in *Schwinn*, the overall territorial restriction upon competition is just as effective.

The majority's contention that *Schwinn* should not be applied in this case because Sylvania imposed neither territorial nor customer restrictions is impossible to reconcile with the jury verdict and the district court's findings of fact, which establish that the location clause operated as a territorial restraint. In its findings of fact, the district court quoted the Sylvania sales manual as follows:

> The manual states, inter alia, that the "franchise contains a good profitable selling climate by creating 'elbow room' in a sensible territory based on market and dealer potential. 'Same brand' competition is eliminated."

The district court found that "[a]lthough retail sales of Sylvania brand merchandise could be made to anyone, the sales could be made only from the store location approved by Sylvania. . . . By reason of the inherent limitations respecting advertising and promotion and delivery and service of sets sold, the territory of a retail dealer for sales was, for all practical purposes, limited to a radius of 25-50 miles from a dealer's store location."[2] It may be true in theory that, as the majority argues, "Sylvania's dealers could sell to customers from any area." But since none of Continental's dealers were located within 50 miles of Sacramento, as a practical matter Continental could not sell televisions in that city. The district court further found that the conspiracy between Sylvania and Handy Andy, Sylvania's principal Sacramento distributor, "resulted in the number of Sylvania franchises in Sacramento being reduced from seven in 1963 to three in 1965 with Handy Andy selling all of the Sylvania color TV sets sold in Sacramento and 80 percent of the black and white ones during the

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[2] *Compare* Professor Schmitt's descriptions of the effects of the location clause employed by automobile manufacturers:

> The location clause inherently limits the dealer's ability to reach customers outside his marketing segment. The size of this segment varies according to the shopping habits of customers, traffic connections and population density. Even though a dealer is free to sell to customers wherever they may be located, the location clause secured market segmentation which effectively allows the manufacturer to control the degree of intrabrand competition. The location clause factually restricts the dealer's business activities directly in terms of territorial freedom and indirectly in terms of freedom of customer choice.

Schmitt, Antitrust & Distribution Problems in Tight Oligopolies —A Case Study of the Automobile Industry, 24 Hastings L.J. 849, 903-04 (1973).

first six months of 1966." The majority does not question the accuracy of any of these findings.[3] The district court thus examined the impact of the Sylvania locations practice, concluding that it amounted to a territorial restriction that prevented Continental from competing in Sacramento, a market in which there was only one significant Sylvania distributor. More importantly, these findings are implicit in the jury's verdict.

Schwinn did not expressly outlaw location clauses by name. It did, however, outlaw any and all territorial restrictions on resale to others. This necessarily includes all devices, the inevitable practical effect of which is to restrict a retailer's territory. We are convinced that Sylvania-type location clauses and *Schwinn*-type territorial restrictions are identical in effect and are both *per se* illegal under the command of *Schwinn.*

It is a cardinal rule of antitrust law that the purpose and effect of certain conduct—not its form—governs its legality. *Simpson v. Union Oil Co.,* 377 U.S. 13, 17, 24 (1964), teaches that when a court is faced

[3]The only finding of the district court questioned by the majority is the finding that Sylvania requested Maguire to sue Continental on its outstanding notes as a part of Sylvania's attempt to prevent Continental from selling Sylvania products in Sacramento. We do not agree that this finding is "in conflict with the finding of the jury that Maguire and Sylvania were not involved in any contract, combination, or conspiracy to enforce the location restriction." Majority Opinion, footnote 7. The jury's conclusion that Maguire was not part of the conspiracy to impose resale restrictions on Continental is consistent with a finding that Sylvania used Maguire in carrying out the conspiracy between Sylvania and Handy Andy found explicitly by the trial judge and by implication by the jury as well.

with a new restricting device, the *effect* of which is substantially the same as that of a method previously condemned as illegal, the *per se* rule must be applied to the new device. To the same effect is *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 899-901 (CA5 1973).[4] This principle is especially applicable to Sylvania. It is sufficient if the restraint is present, in fact, whether the outgrowth of an express or an implied understanding. *Hobart Brothers Co., supra,* at 900; *Beverage Distributors, Inc. v. Olympia Brewing Co.,* 440 F.2d 21, 28 (CA9 1971).

Schwinn, says the majority, involved a restriction on the locations and types of *vendees,* while Sylvania only imposed restrictions on the permissible locations of *vendors.* In attempting to limit the effect of *Schwinn,* the majority completely overlooks the *Schwinn* language outlawing any type of a restraint on alienation after the passage of title and dominion. Without giving a reason, the majority, in its interpretation of *Schwinn,* says: "It is clear to us that 'territory and areas' refer to the location of vendees, rather than vendors." There is nothing in *Schwinn* to suggest such a distinction. Moreover, since Syl-

[4]In *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., supra,* the manufacturer, Hobart, used an area of primary responsibility clause to limit the territory in which Gilliland would sell Hobart's products. Since Hobart not only manufactured but also sold on the same level as its dealers, the effect of the restriction was a horizontal division of markets eliminating competition between Hobart and its dealers. The court concluded that "[s]uch an arrangement must be treated as it operated in practice rather than 'as arranged by skillful drafting.' Cf. Simpson v. Union Oil Co., 377 U.S. 13 (1964)." *Id.* at 899. *See* Reed Bros., Inc. v. Monsanto Co., ... F.2d, ... (CA8 (1975) [slip op. at 4-5, 14]; Interphoto Corp. v. Minolta Corp., 417 F.2d 621, 622 (CA2 1969).

vania's enforcement of its location clause, coupled with hard economic facts, prevented consumers in Sacramento from buying Sylvania televisions from Continental the present case involves a direct limitation on the location of permissible vendees.

III.

The majority's strained emphasis upon the decree of the district court on the *Schwinn* remand demonstrates the futility of its search to find a ready answer to the *Schwinn* directive. First of all, the district court decree could not alter or change the effect of the *Schwinn* decision. More importantly, that the district court followed through on the *Schwinn* command is made clear by the following language of its judgment:

> "Defendant Schwinn and the Association are each jointly and severally enjoined and restrained from, directly or indirectly, imposing, inducing, or securing any condition or any agreement or understanding that limits the freedom or any distributor or retailer of Schwinn products as to where and to whom it may resell such products, by oral or written statements or by acts of retaliation." 291 F. Supp. 564, 565 (N.D. Ill. 1968).

It is true that the remand decree allowed Schwinn to designate in its retail franchise agreements the place of business for which a franchise is issued. Obviously this provision must be read in light of the language of the entire decree and of *Schwinn* itself. So read, it means only that a manufacturer can specify the location at which a retailer is the manufacturer's au-

thorized representative and assign areas of primary responsibility, but that a manufacturer cannot impose resale restrictions forbidding retailers from selling the manufacturer's product except where the manufacturer allows.

We feel that Justice Clark, writing for the Court, properly interpreted the overall effect of the district court judgment on the *Schwinn* remand in *Reed Brothers, Inc. v. Monsanto Chemical,* ..... F.2d ..... (CA8 1975) [slipsheet p. 13]. He there said: ". . . [A] manufacturer may properly designate geographic areas in which distributors shall be primarily responsible for distributing its products and may terminate those who do not adequately represent it or promote the sale of its products in such areas." Citing *Schwinn* on remand, 291 F. Supp. 567, 568. The *Reed Bros.* decision fully supports our conclusion that *Schwinn* controls on our facts. Time and time again, the *Reed Bros.* court echoes the *Schwinn* precept that once a manufacturer parts with title to and dominion over the product, it is a *per se* violation of the Sherman Act to restrict areas within which, or persons to whom, an article may be resold.

The majority also seeks support for its views in a provision of the decree on remand in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). In fact, *Topco* strengthened and extended the *Schwinn per se* rule against territorial restrictions.[5] *Topco,* which struck down a horizontal division of terri-

[5] *See* Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 941-43 (CA5 1975).

tories, explained the reason for the *Schwinn per se* approach:

> "Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules in some or all cases, and leave courts to ramble through the wilds of economic theory in order to maintain a flexible approach." *Id.* at 609-10 n. 10.

The majority would downgrade *Topco* by insisting that it was severly limited by the judgment on remand, which judgment was later affirmed without comment by the Supreme Court.[6]

Upon remand in Topco,[7] the district court in the forepart of its decision carefully followed the decision of the Supreme Court by prohibiting the defendant

[6]United States v. Topco Associates, Inc., supra.

[7]United States v. Topco Associates, Inc., 1973-1 Trade Cases, ¶ 74,391 (N.D. Ill.).

I

[*Territories; Restrictions*]

The defendant and its member firms have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. §1) by restricting the territories within which or the customers to whom the members firms may sell Topco brand products.

• • • • •

III

[*Bylaws; Rules*]

Defendant is ordered and directed, within 210 days from the entry of the Final Judgment, to amend its bylaws, Membership and Licensing Agreements, resolutions, rules and regulations to eliminate therefrom any provisions which in any way limits or restricts the territories within which or

from any type of an arrangement which would restrict the territories within which or persons to whom any member firm might sell products procured from or through Topco, and then went on to engage in a lot of gobbledygook, introducing what seems to be a meaningless paragraph V with reference to locations which, in pertinent part, reads:

"V

> Notwithstanding the foregoing provisions, nothing in this Final Judgment shall prevent defendant . . . (2) from designating the location of the place or places of business for which a trademark license is issued, provided that defendant shall not refuse to grant a trademark license to any member or withdraw a license from any member, except any withdrawal incident to the bona fide termination of any member firm's membership in Topco, if such action would achieve or maintain territorial exclusivity in any member firm; . . . ." *Id.* at ¶74,391.

While the provision is loaded with ambiguity, even at its clearest it can mean no more than that Topco would be entitled to designate the location of the place or places of business for which a trade mark license is issued, provided that the granting of such

the persons to whom any member firm may sell Topco brand products.

IV

[*Agreements*]

Defendant is enjoined and restrained from adopting any bylaw, resolution, rule or regulation and from maintaining, adhering to, entering into or enforcing any contract, agreement, arrangement, understanding, plan or program in which Topco limits or restricts the territories within which or the persons to whom any member firm may sell products procured from or through Topco.

location did not result in restricting the territories within which or the persons to whom any member firm might sell products procured from or through Topco, in violation of the Supreme Court *Topco* decision and Paragraphs I, III, and IV of the district court decision on remand.

That the attorneys for Topco on the appeal from the judgment on remand placed no such construction on the district court judgment is made evident by the following language taken from pages 5 and 6 of their brief on appeal, to-wit:

> "The district court outlined in Paragraph V the activities in which the defendant could engage without violating the court's injunction. The government argues that Paragraph V renders the decreed relief inadequate 'because it fails to protect against and in fact permits continuation or renewal of the collective allocation of territories among competing sellers of Topco branded products' (Juris. Statement, p. 5) In fact it does not. *By its very terms Paragraph V forbids any of these practice if they are 'directly or indirectly used to achieve or maintain' the prohibited territorial restrictions.* (App. C, p. XX.) *If Topco were to engage in activity showing such an effect, a violation of the decree would result.*" [Emphasis supplied.]

With Topco making this concession, it is easy to understand why the Supreme Court affirmed without comment.

Early this year the Fifth Circuit in *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (CA5 1975), commenting on *Topco* and *Schwinn* said:

> "Notwithstanding, *Standard Oil Co. v. United States,* 1911, 221 U.S. 1, 31 S.Ct. 502, 55 L. Ed. 619, *Topco* and *Schwinn,* read together, suggest that at this point we must accept the fact that the Court has set its face against both horizontal and vertical territories restrictions, with the possible exception of vertically imposed restrictions by 'new entrants' and 'failing companies' briefly mentioned in *Schwinn.*" *Id.* at 943.

We are not persuaded by the majority's exhaustive analysis of *Copper Liquor.* No matter how it is digested, it reaffirms the *Schwinn* dogma that the Supreme Court has "set its face against both horizontal and vertical territorial restrictions, with the possible exception of vertically imposed restrictions by 'new entrants' and 'failing companies.'" Sylvania is neither a "failing company" nor a newcomer seeking to break into the television business.

As recently as November 15, 1975, the Fifth Circuit in *Eastex Aviation, Inc. v. The Sperry & Hutchinson Co.,* 522 F.2d 1299, reaffirmed its position that where a manufacturer sells products to distributors subject to territorial restrictions on resale, there is a *per se* violation of the Sherman Antitrust Act and that it is unreasonable, without more, for a manufacturer to seek to restrict and confine areas of persons with whom an article may be traded after the manufacturer has parted with dominion over the article.

IV.

The majority conveniently confuses and integrates location clauses and exclusive dealerships, claiming

them to be so interdependent as to make exclusive dealerships useless without resale-type location clauses as an enforcement option. The two are clearly distinguishable. In an exclusive dealership, the distributor, dealer, or franchisee obtains a manufacturer's *self-imposed promise not to contract with another distributor in the general area.* A location clause with a restraint on alienation deals with the manufacturer's control over the place from which a distributor, dealer, or franchisee may resell a product. *Schwinn* expressly ordains the exclusive dealership to be an acceptable practice, as do cases on which the majority relies, for example, *Bushie v. Stenocord Corp.,* 460 F.2d 116 (CA9 1972), and *Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (CA9 1969), *cert. denied,* 396 U.S. 1062 (1970). Neither *Seagram & Sons* nor *Bushie* extend approval to location clauses, such as those under scrutiny. They deal solely with exclusive dealerships. It is one thing for a manufacturer to restrict its own behavior. It is quite another to try to restrict that of an independent business entity.

It is generally agreed that the utility of exclusive dealerships resides in the ability to manipulate the density of sales outlets. The grant of an exclusive dealership is but a promise by the manufacturer not to sell to other nearby distributors. This serves as the stimulus for active product marketing by dealers. However, under *Schwinn,* if a manufacturer uses the grant to prevent the dealer from reselling goods in which the dealer has full title and dominion, he is employing a prohibited restraint on alienation. Just because the courts have approved exclusive dealerships such as involved in *Seagram & Sons* and *Bushie,* does not mean that manufacturers can employ a location clause to place a restraint on alienation in order to limit the territories in which their distributors can resell. We agree with the commentator who described as "fallacious" the "contention that the location clause is lawful as long as the manufacturer lawfully can grant exclusive franchises. These two types of restrictions are vastly different in terms of market impact. By an exclusive franchise agreement, a manufacturer voluntarily restricts itself. However, when the manufacturer imposes resale restrictions it exercises control over one of the most crucial competitive decisions which any truly independent tradesman must make—where and to whom he will sell his wares. To claim that granting an exclusive franchise is a lawful restraint on alienation on the manufacturer's part and to deny any analytical difference to restraints on alienation imposed on members of the next economic level is legal nonsense." *Schmitt, supra,* note 2 at 907-08.

The majority argues that applying a rule of *per se* illegality to location clauses renders the exclusive distributorship tool useless because its turns a dealer franchised somewhere into a dealer franchised everywhere. This argument is similar to the majority's contention that if a manufacturer has the right to designate the location where a franchise is valid, "then the manufacturer must have the power to enforce

these rights if a franchisee violates his location clause agreement." According to the majority, the distinction between the right to approve locations and the right to limit the freedom of a distributor as to where it may sell is "artificial" or "spurious."

The majority commits the same mistakes with respect to both the right to franchise by location and the right to grant exclusive dealerships. Neither device is rendered useless by permitting Continental to sell Sylvania televisions in Sacramento. Sylvania can insure that its products are effectively marketed by granting exclusive distributorships, thereby limiting itself, and by assigning spaced locations and areas of primary responsibility, thereby imposing obligations on its dealers. But *Schwinn* bars territorial and customer restrictions on resale. Thus, once Sylvania's legitimate interest in full distribution of its products is satisfied, it has no right to prevent Continental from selling in Sacramento. An analogous distinction was made in *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., supra.* The court stated that the manufacturer, Hobart,

> ". . . could refuse to deal with Gilliland, but that right did not give Hobart immunity so that it could use an illegal territorial restraint." *Id.* at 900.

The court in *Fontana Aviation, Inc. v. Beech Aircraft Corp.*, 432 F.2d 1080, 1085 (CA7 1970), said that if this right is accompanied by an unlawful agreement "or conceived in . . . market control," then the right "transgresses" the antitrust laws. Similarly, in the

present case, Sylvania's right to grant exclusive distributorships, to approve locations, and to assign areas of primary responsibility does not give it immunity to impose territorial restraints on resale. Arguments to the contrary amount to nothing more than veiled attacks on *Schwinn.*

V.

Although location clauses operate to severely reduce or eliminate intrabrand competition, the majority argues that the *consequence* of such clauses is improved interbrand competition, a desirable end under the Sherman Act. That this reasoning, from an antitrust policy viewpoint, is fallacious is demonstrated by the following language in *Topco:*

> *"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.* And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. *Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competitions in a more important sector of the economy. Cf. United States v. Philadelphia National Bank,* 374 U.S. 321, 371 (1963).
>
> "The District Court determined that by limiting the freedom of its individual members to com-

pete with each other, *Topco* was doing a greater good fostering competition between members and other large supermarket chains. But, the fallacy in this is that *Topco* has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products. *Without territorial restrictions, Topco members may indeed '*[*cut*] *each other's throats.' . . . But, we have never found this possibility sufficient to warrant condoning horizontal restraints of trade."* 405 U.S. at 610-11. [Emphasis supplied.]

Though a horizontal restraint case, *Topco* stands for the rule that restricted intrabrand competition cannot be justified by alleged interbrand competitive gain. This rule not only causes the majority rationale to fail, but it provides an excellent economic justification for the *Schwinn per se* rule, the preservation and encouragement of intrabrand competition, as a desirable end in itself. Under the *Schwinn per se* rule, small business, free enterprise, and the free market are all necessary beneficiaries.

VI.

A few words about the majority's cases.

The exclusive dealership cases, including *Hawaiian Oke* and *Bushie,* have already been distinguished. Great weight is placed on *White Motor Co. v. United*

States, 372 U.S. 253 (1963), a case in which the Supreme Court declined to apply a *per se* rule to vertical restrictions, somewhat similar to those in *Schwinn.* In *White,* the Court simply said it was not yet ready to apply the rule. That the *White* Court did not refuse to apply the *per se* rule or reach the plateau attributed to it by Justice Stewart in his *Schwinn* dissent is made manifest by the following pertinent language:

> *"We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. . . .* We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' . . . *and thereafter should be classified as per se violations of the Sherman Act." Id.* at 263.[8]

Justice Stewart's outrage at the breadth of the *Schwinn* decision is capsulized in his expression, "No previous antitrust decision of this Court justifies its action. Instead, it completely repudiates the only case in point, *White Motor."* 388 U.S. at 388-89. That the fundamental core of the *Schwinn per se* rule is the residence of title and risk is clearly established by Justice Stewart's dissent in which he can find no valid

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[8]The majority cites Justice Brennan's concurring opinion in *White Motor* as supporting the lawfulness of area of primary responsibility covenants, which the majority defines as agreements "obligating a distributor to concentrate his sole efforts in a specified geographical area. . . ." The thrust of the provisions approved by Justice Brennan, however, was "only that the dealer must adequately represent the manufacturer in the assigned area, not that he must stay out of other areas." 372 U.S. at 271-72, n. 12.

ground on which to apply the rule of reason to a principal-agent relationship and not apply the same rule to the relationship of vendor-vendee. The Justice's focus on the sales/agency dichotomy certainly demonstrates his view on the essence of the *Schwinn* decision. The *consent decree* on the remand of *White Motor, United States v. White Motor Co.,* 1964 Trade Cas. ¶ 71,195 (N.D. Ohio), eliminating territorial and customer restraints from the franchised contract gives us considerable insight to the company's interpretation of the Supreme Court's decision.

The majority argues that the employment of the *Schwinn per se* rule on the facts of the present case would be wholly inconsistent with *United States v. General Motors Corp.,* 384 U.S. 127 (1966). The *Schwinn* Court pointed out that *General Motors* was, first of all, a horizontal restraint case. More than that, in *General Motors* the dealers initiated the restraint, unlike the manufacturers in *Schwinn* and *Sylvania* and, finally, *General Motors* and other majority citations are highly suspect due to their age.

A case which is not old and on which the majority heavily relies is *Salco Corp. v. General Motors Corp.,* 517 F.2d 567 (CA10 1975).[9] Although involving a

[9]It is mentioned in the body of our dissent that *Salco* failed to recognize or even mention the *Schwinn* prohibition on resale. To demonstrate that this restriction is now fully recognized in the later 10th Circuit case of *World of Sleep,* we quote:

> "The *Schwinn* case played a dominant role in the trial of the instant case, and the trial judge attempted to tailor his instructions to fit the teaching of that case. In *Schwinn,* it was held that where a manufacturer, such as Stearns in the instant case, sells his product to a distributor, such as World of Sleep, and in connection with such sale 'firmly and resolutely' subjects the distributor to territorial restrictions upon resale, whether by 'explicit agreement or silent combination or understanding with his vendee,' a *per se* violation of the Sherman Act results." *Id.* at 44.
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> "*Schwinn* also stands for the proposition that where a manufacturer does not sell his product to a dealer, but on the contrary retains title, dominion and risk with respect to the product, and the position of the dealer is akin to that of an agent or salesman of the manufacturer, a territorial limitation on such type of a dealer is violative of the Sherman Act only if the impact of such limitation is 'unreasonably' restrictive of competition. . . ." *Id.* at 45.

franchise with a location clause, the authority of the decision on our point is fatally weakened by the failure of the court to recognize the *Schwinn* prohibition on resale, or even make known that such a prohibition was part and parcel of the *Schwinn* dogma. The only mention of *Schwinn* is in connection with the well known tenet that a manufacturer of a product for which equivalent brands are readily available in the market may select his customers and for this purpose may franchise certain dealers to whom, alone, he will sell his goods. No one disputes that rule. *Boro Hall Corp. v. General Motors Corp.,* 124 F.2d 822 (CA2 1942), cited in *Salco,* is a relatively ancient case decided long before *Schwinn.* Additionally, the case is not in point. There the record clearly shows that there was no restriction on the used car dealer preventing the sale of automobiles outside the "zone of influence." For that matter, the dealer was notified that he could even establish a location outside of his zone of influence as long as it was not "unduly prejudicial to the interests of other dealers." This is a far cry from the concrete mold in which Sylvania attempted to place Continental.

The force of *Boro Hall* and *Salco* is further undermined by a recent exhaustive study of distribution practices in the automobile industry. Schmitt, supra, n.2.[10] The author of the study concludes that "[i]n the context of automobile dealerships, the location clause constitutes a flat territorial prohibition. Any other conclusion would be a gross distortion of the hard economic facts." *Id.* at 904. He further concludes that the location clause is a device through which "the automobile manufacturers effectively have achieved control over intrabrand competition," which has no economic justification, and which "merely substitutes the manufacturers' decisions for those which a dealer should make on the basis of the dictates of the market." *Id.* at 905-06.

Finally, some comment should be made on the majority's quotation from an address by a Deputy Assistant Attorney General in the Antitrust Division. The quotation in the majority opinion is: "And only last year, a spokesman for the Antitrust Division stated that locations clauses 'are not illegal standing by themselves' since '[t]hey reflect the manufacturer's legitimate interest in having his goods distributed efficiently through a particular area.'" The context from which the quotation of Mr. Clearwater was taken is as follows:

[10]After reviewing *Schwinn* and several other relevant authorities, the author states that

> . . . to dust off the old *Boro Hall* decision and add that the location clause was not rendered unlawful in *United States v. General Motors Corp.* thereby concluding that "the Schwinn decision does nothing to change prior law on the subject" is questionable at best.

> "'Location' and 'primary responsibilty' clauses—under which a seller designates the specific location of his purchaser-customer, or the geographic area in which the purchaser-customer is primarily responsible for the sale of the seller's products—are not illegal standing by themselves. They reflect the manufacturer's legitimate interest in having his goods distributed efficiently throughout a particular area. The purchaser-customer, however, is not restricted from selling elsewhere once the interests of the manufacturer are satisfied. *Reading between the lines, however, in those instances in which such clauses are in fact used as a means to impose a territorial restriction on sales, the Department would, of course, consider them illegal.*" (Clearwater, Franchising and the Antitrust Laws, May 16, 1974). [Emphasis supplied.]

Since, as both the jury and the district court found, the location clauses involved in this case were used by Sylvania to impose a territorial restriction on sales, "the Department would, of course, consider them illegal."

VII.

Initially, Sylvania urged that it was entitled to an instruction on the "failing company" rule stated in *Citizens Publishing Co. v. United States,* 394 U.S. 131 (1969). The majority does not now press for an application of that rule. This is understandable. The evidence offered by Sylvania shows that by 1965 it had made a remarkable recovery from its unstable position in the early sixties. We agree with the trial judge that there was insufficient evidence to submit this issue to the jury.

CONCLUSION

A close analysis and study of the majority opinion reveals that it is patterned after and closely follows Justice Stewart's lengthy and exhaustive dissent in *Schwinn*. When viewed in broad perspective, the majority holds that *Schwinn* is bad law and that we should adopt the Stewart approach. We decline to join in an opinion which, we believe, would *sub silentio* overrule a decision of the Supreme Court.

In urging affirmance, we do not go beyond the jury's verdict that Sylvania enforced its location agreement to create an illegal territorial restraint restricting the locations from which Continental could sell its products. We do not need to decide whether a location clause, without more, creates a *per se* violation of the Sherman Act.

WE WOULD AFFIRM.

CHAMBERS, Circuit Judge, concurring and dissenting:

I concur in the judgment of the majority. I dissent from the number of words used to arrive at the point of reversal. Naturally, this river of words brought forth elongated dissents.

One will note that the author of the majority opinion cites the Texas Law Review and other law review comments in his footnote No. 1. These are notes on this case. Law reviews used to wait until the judicial process in a case was complete before entering

the fray. Now they chaperone us during the pendency of a case. This is their First Amendment right.

But if this practice of citing their current comment continues, then we shall be out lining up law reviews to support our views. After that we shall be taking the step of quoting the New York Times and the Chicago Tribune. And it will be an easy jump then to include in our opinions the current comments of the Abilene Bugle and Bisbee's Brewery Gulch Gazette.

BROWNING, Circuit Judge, dissenting:

It is the premise of the majority opinion that the jury was instructed that location clauses are per se illegal under the Sherman Act. Such an instruction, the majority argues: (1) is not supported by *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); (2) is inconsistent with the rule permitting exclusive dealerships; and (3) is at odds with the purpose of the Sherman Act.

Judge Kilkenny's opinion demonstrates that the majority's premise is not substantiated by the record. The jury was not instructed that it is unlawful for a manufacturer to designate the location for which a dealer is franchised. Precisely to the contrary, it was instructed that location clauses are lawful. The case was submitted to the jury on the theory that a violation of the antitrust laws is to be found *only* if Sylvania conspired to control the territories in which its dealers resold merchandise purchased from Syl-

vania. This was the understanding of counsel for both parties.

Judge Kilkenny's opinion further demonstrates that the legal theory reflected in the instructions is fully supported by *Schwinn,* and is consistent with the line of authorities upholding exclusive dealerships.

It is the purpose of this opinion to deal with the majority's third contention by showing that a major purpose of the Sherman Act is served by the rule prohibiting a seller from restricting the territory in which the purchaser resells the purchased mechandise. This opinion will also seek to establish that it is appropriate to classify such territorial restrictions as per se illegal, rather than to base illegality upon an ad hoc judicial determination of unreasonableness in the circumstances of each case.

I

The jury's verdict determined that Sylvania restricted the territory in which Continental could resell television sets purchased from Sylvania. Where to sell is a crucial business question. The answer determines the markets in which the seller will compete. Thus, Sylvania interfered with the exercise of Continental's business judgment in a way that significantly impaired Continental's freedom to compete.

Sylvania's conduct toward Continental thwarted an important purpose of the Sherman Act. Legislative history and Supreme Court decisions establish that a principal objective of the Sherman Act was to protect the right of independent business entities to make

their own competitive decisions, free of coercion, collusion, or exclusionary practices.[1]

Congress' general purpose in passing the Sherman Act was to limit and restrain accumulated economic power, represented by the trusts, and to restore and preserve a system of free competitive enterprise. The congressional debates reflect a concern not only with the consumer interest in price, quality, and quality of goods and services, but also with society's interest in the protection of the independent businessman, for reasons of social and political as well as economic policys.[2]

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[1]If the majority's statement that "the legislative intent underlying the Sherman Act had as its goal the promotion of consumer welfare" (p. 30) is meant to exclude other purposes, it is refuted by the legislative history referred to in the authorities cited herein. Even assuming that some contemporary economists might maintain that in a given case consumer interests might be better served by eliminating competition between independent businessmen, "There is little evidence that Sherman and the others had any idea of imposing an economist's model of competition on American industry. They did not consult economists of the time; and if they had done so, they would have found little support for any such course." A. Neale, The Antitrust Laws of the United States of America 13 (2d ed. 1970). In striking contrast to the views of the Congress, economists of the late 1800's considered "trusts" and other combinations to be a natural evolutionary advance, and monopolies to be both inevitable and potentially beneficial. Letwin, Congress and the Sherman Antitrust Law: 1887-1890, 23 U. Chi. L. Rev. 221, 237-38 (1956). Considering the level of economic thought prevailing in 1890, it is inconceivable that Congress passed the Sherman Act "out of an exclusive preoccupation with the idea that prices should always equal marginal costs." Blake & Jones, In Defense of Antitrust, 65 Colum. L. Rev. 377, 384 (1965).

[2]In the congressional debates, the Sherman Act was urged as a means of dealing with great trusts, that had accumulated tremendous power threatening small businessmen, the consuming public, and the social order. Its purpose was variously conceived to be to preserve 'free and full competition,' to protect the public against high prices, and to protect small business and individual freedom against corporate wealth and power. In the broad, general terms

The Supreme Court has implemented the statutory policy of protecting the independence of individual business unit in a series of decisions banning resale price maintenance agreements. These cases are particularly relevant here for, like territorial restraints, resale price maintenance is justified by manufacturers as necessary to enable them to control intrabrand competition by independent dealers in the interest of effective interbrand competition. Indeed, "*any* argument that can be made on behalf of exclusive territories can also be made on behalf of resale price maintenance."[3]

In the first resale price maintenance decision, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), contracts between a manufacturer and its dealers setting minimum retail prices at which the product could be sold were held illegal in part because they created a "restraint upon alienation," which the Court described as "restricting the freedom

of the debates, the Senators appeared to regard these social, political, and economic purposes as consistent, collateral thrusts of the Act." Bohling, Franchise Terminations Under the Sherman Act: Populism and Relational Power, 53 Texas L. Rev. 1180, 1189 (1975). "The legislators were well aware of the common law on restraints of trade, and of the powers of monopolists to hurt the public by raising price, deteriorating product, and restricting production. At the same time, there was at least equal concern with the fate of small producers, driven out of business, or deprived of the opportunity to enter it, by 'all powerful aggregations of capital.'" C. Kaysen & D. Turner, Antitrust Policy 19 (1959). *See also* United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945); A. Neale, *supra* note 1, at 12-13; H. Thorelli, The Federal Antitrust Policy 227 (1954); Blake & Jones, Toward a Three-Dimensional Antitrust Policy, 65 Colum. L. Rev. 422, 422-24 (1965); Blake & Jones, *supra* note 1, at 382-84.

[3]Posener, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger, and Potential Competition Decisions, 75 Colum. L. Rev. 282, 293 (1975).

of trade on the part of dealers who own what they sell." *Id.* at 407-08. The Court concluded that after Dr. Miles "sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." *Id.* at 409.

Agreements requiring purchasing dealers to observe resale prices fixed by the vendor were held illegal per se in *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920), because such agreements are "designed to take away dealers' control of their own affairs and thereby destroy competition . . . ." *Id.* at 100. In *Simpson v. Union Oil Co.*, 377 U.S. 13, 17 (1964), the Court struck down a system of consignment agreements between a producer of gasoline and independent service station operators, stating, "If the 'consignment' agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignees, and, in any event, to sell at competitive prices." *Id.* at 16. The Court condemned the consignment program "for destroying competition in retail sales of gasoline by these nominal 'consignees' who are in reality small struggling competitors seeking retail gas customers." *Id.* at 21. In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), the Court held an agreement among competitors to fix maximum resale prices to be illegal because "such agreements, no less than those to fix minimum prices,

cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Id.* at 213.

The same theme of protecting the right of independent business entities to compete runs through Supreme Court decisions holding group boycotts illegal per se. In the first of these cases, *Montague & Co. v. Lowry,* 193 U.S. 38 (1904), the Supreme Court emphasized the impact of the restraint upon independent dealers, who had been precluded from conducting "their business as they had therefore done." *Id.* at 47. In *Paramount Famous Lasky Corp. v. United States,* 282 U.S. 30 (1930), an agreement was held to violate section 1 of the Act because its purpose was to "coerce" independent theater owners into submitting to "unusual arrangements which unreasonably suppress normal competition." *Id.* at 43. Use of a boycott to end "style piracy" was outlawed in *Fashion Originators' Guild v. FTC,* 312 U.S. 457 (1941), in part because it "took away the freedom of action" of participants, *id.* at 465, and forced them to accept "a rival method of competition," *id.* at 467. Similarly a group boycott was banned in *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), even though it might lower prices or temporarily stimulate competition, "[f]or, as this Court said in *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211, 213, 'such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.'" 359 U.S. at 212. The Act was violated because the boycott "takes

from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever." *Id.* at 213.

In many other contexts, the Supreme Court has rested decisions upon the premise that protection of the freedom to compete of separate business entities is an important objective of the Sherman Act. In *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963), for example, the Court reasoned that the antitrust laws are an appropriate check upon anticompetitive conduct of market exchanges, "[s]ince the antitrust laws serve, among other things, to protect competitive freedom, i.e., the freedom of individual business units to compete unhindered by the group action of others . . . ." *Id.* at 359-60. A combination between General Motors and some of its dealers to eliminate sales through "discount houses" was held per se illegal in *United States v. General Motors Corp.,* 384 U.S. 127 (1966), because it served "to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose." *Id.* at 140. In *FTC v. Brown Shoe Co.,* 384 U.S. 316 (1966), the Court commented as follows upon Brown Shoe Company's program requiring retail dealers to agree

to buy shoes for resale only from the Brown Shoe Company and not from its competitors: "This program obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market." *Id.* at 321. In *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), the Court held the Sherman Act violated by an agreement between a union and group of employees to impose uniform labor standards upon all employers in the industry, noting "the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. . . . It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy." *Id.* at 668.

From the holdings and rationale of these and other Supreme Court decisions, "it seems clear that the protection of individual traders from unnecessary restrictions upon their freedom of action is a significant independent objective of antitrust policy."[4] As a commentator recently put it, "The most important of the social policy objectives found in the Court's antitrust decisions are the concepts of business independence and freedom of business opportunity.[5] In Judge Hand's well-known words, Congress was not "actuated by economic motives alone. It is possible, because

[4]Blake & Jones, *supra* note 2, at 436. *See* also, Jones, The Growth and Importance of Franchising and the Role of Law, 12 Antitrust Bull. 717, 741 (1967).

[5]Bohling, *supra* note 2, at 1190.

of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the directions of a few. These considerations, which we have suggested as possible purposes of the Act, we think the decisions prove to have been in fact its purposes."[6]

In *Schwinn* the Supreme Court relied upon several of the cases referred to above *(Dr. Miles Medical Co. v. John D. Park & Sons Co., supra; Klor's, Inc. v. Broadway-Hale Stores, Inc., supra; Fashion Originators' Guild v. FTC, supra;* and *United States v. General Motors Corp., supra)* in holding per se illegal "any limitation upon the freedom of distributors to dispose of the Schwinn products, which they have bought from Schwinn, where and to whomever they choose. The principle is, of course, equally applicable to sales to retailers, and the decree should similarly enjoin the making of any sales to retailers upon any condition, agreement or understanding limiting the retailer's freedom as to where and to whom it will re-

[6]United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945).

A perceptive foreign observer suggests that this preference for a system of independent, competing business entities reflects an American distrust "of all sources of unchecked power":

> An economy made up of independent, competing business units fulfils the condition that economic decision making should be dispersed and renders the holders of economic power liable to mutual encroachment. It is important to this conception that the individual's right to engage in business activities of his own choice shall be preserved and that no single economic unit, whether in the form of monopoly or combination, shall be able to exclude rivals at its own behest and so render its own power immune from invasion.

A. Neale, *supra* note 1, at 430.

sell the products." *United States v. Arnold, Schwinn & Co., supra,* 388 U.S. at 378.

The rationale suggested in this and other passages in *Schwinn* is fully and forcefully reiterated in *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610 (1972):

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle is can muster.

It is apparent that the *Schwinn-Topco* doctrine outlawing any contract, combination, or conspiracy to impose territorial restraints upon independent traders is founded upon an important and long recognized purpose of the Sherman Act.

II

The remaining question is whether restraints upon the territory in which independent dealers may resell should be condemned without regard to the reasonableness of the restraint in a particular case.

Quoting from *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 5 (1958), the majority argues that the rule of per se illegality should apply only to a restraint that has a "pernicious effect on

competition" and also "lacks any redeeming virtue." The majority recognizes that a territorial restraint upon dealers does eliminate competition in the sale of the manufacturer's products. The majority argues, however (in part upon the authority of Mr. Justice Brennan's concurring opinion in *White Motor Co. v. United States,* 372 U.S. 253, 26 9(1963)), that a territorial restraint upon dealers may have the "redeeming virtue" of enhancing competition in the sale of the products of different manufacturers. The majority concludes that the "rule of reason" therefore applies, and the reasonableness and hence the legality of territorial dealer restraints should be left to the jury to decide in each case.

The major flaw in this argument is that it ignores the two most relevant and recent cases, *Schwinn* and *Topco.* As Judge Kilkenny's opinion demonstrates, the jury found that Sylvania conspired to control the territories in which Continental and other Sylvania dealers sold products purchased from Sylvania. *Schwinn* and *Topco* hold such conduct to be illegal per se under the Sherman Act.

This should end the matter for an intermediate appellate court, even if the correctness of the *Schwinn-Topco* analysis were doubtful. A reexamination of the *Schwinn-Topoc* analysis in the light of the facts of this case, however, demonstrates that the analysis is sound.

The Supreme Court did not merely resurrect the rule against restraints on alienation in drawing the

line separating vertical territorial restraints that are per se illegal from those prohibited only if shown to unreasonably restrict competition.

The naked transfer of title is not a determinative fact. The per se rule may be applicable though the manufacturer retains title. It applies unless "the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer . . . ." 388 U.S. at 380.[7] Thus, the line drawn separates restraints imposed by a principal upon his agent, from those imposed by one

[7]Under *Schwinn* "a juggling of labels or of the place of passage of title will not suffice to invoke rule of reason treatment. Nor will the casting into the consignment mold of relationships with independent economic entities in the distribution business, whose business decisions on the sale of the products would reflect functions, investments, and goals which in fact differ from those of the producer, serve to immunize restrictions. In fact, as well as in form, the consignee's function must be close to that of a mere salesman for the producer, for the law to tolerate producer-imposed restrictions on the consignee's decision-making." Zimmerman, Distribution Restrictions After Sealy and Schwinn, 12 Antitrust Bull. 1181, 1188-89 (1967); *see* Johnson, The Role of Agency and Sale in Antitrust: General Electric, Simpson, Schwinn, 53 Minn. L. Rev. 57, 67 (1968). When asked whether a supplier could avoid the impact of *Schwinn* by switching to distribution by consignment, Professor Turner (then Assistant Attorney General in charge of the Antitrust Division) replied:

> [O]ur position would be that any time we see price fixing and resale price maintenance, territorial restrictions, or customer limitations imposed on distributors—though they be called consignees—who are performing significant functions in addition to a selling function, and there is no excuse of the kind we have indicated we think reasonable, such as new entrants, we will attack those restrictions.

Panel Discussion, Orderly Marketing, Franchising and Trademark Licensing: Have They Been Routed by Schwinn and Sealy? 1968 Antitrust Law Symposium 27, 44. *See also* Simpson v. Union Oil Co., 377 U.S. 13, 20-22 (1964).

independent business entity upon another.[8] Even if the applicability of the per se rule depended entirely upon the passage of title, that even usually serves to distinguish independent business entities operating on different functional levels of distribution; for, as the Court noted in *Schwinn,* "most merchandise is distributed by means of purchase and sale." 388 U.S. at 379. It is therefore evident that the Court has located the boundary for application of the per se rule in a way that serves the Sherman Act's purpose of preserving the competitive freedom of independent businessmen.

Despite the majority's contention that a per se rule is appropriate only if the restraint "lacks any redeeming virtue," the Supreme Court's holding in *Schwinn* and *Topco* that a restriction upon the territory in which independent traders may resell is per se illegal did not depend upon a conclusion that this restraint has no affirmative value. On the contrary, the Supreme Court recognized that in some circumstances a territorial restraint may promote competition. The Court held that such a restraint is nonetheless per se illegal when imposed upon independent business entities (1) because such a restraint is "ob-

[8]Professor Averill writes that behind *Schwinn* is "the idea that each separate unit of a distribution system which risks its capital and relies upon its own initiative to market a product deserves to have commensurate authority to freely decide how, where and to whom it will sell." Averill, Sealy, Schwinn and Sherman One: An Analysis and Prognosis, 15 N.Y.L.F. 39, 64 (1969). Other commentaries in which *Schwinn* is identified with a purpose to promote and preserve the freedom of independent economic units include Jones, *supra* note 4, at 746; The Supreme Court, 1966 Term, 81 Harv. L. Rev. 69, 236 (1967); Note, Antitrust Law and *The New Industrial State:* An Application to Automobile Distribution Practices, 4 U.S.F. L. Rev. 78, 105 (1969).

viously destructive" of competition among independent dealers, and (2) because it is not an appropriate judicial function to strike a public interest balance between the certain loss of competition among independent dealers and a possible gain of competition at some other point in the marketing process.

The fact that territorial restrictions inevitably eliminate intrabrand competition among independent dealers is, as the Supreme Court said, obvious.[9] Sylvania concedes as much. Continental's efforts to compete with Handy Andy in the sale of Sylvania products in the Sacramento area were frustrated by Sylvania's enforcement of the location clause. The district court found that after Continental's effort to compete was aborted, Handy Andy sold all of the Sylvania color television sets that were sold in Sacramento.

The Supreme Court knew that benefits to interbrand competition were asserted to flow from manufacturer control of the marketing areas in which dealers sold. It was because of such benefits that the Court sustained territorial restrictions as applied to Schwinn's dealers who were in fact indistinguishable in position and function from "an agent or salesman" of Schwinn.[10] However, the Court declined to consider asserted benefits to interbrand competition where, as

[9]388 U.S. at 379. *See* Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 941 n.5 (5th Cir. 1975) ("Vertically imposed territorial restraints have the obvious effect of reducing or eliminating intrabrand competition, whatever their effect may be on interbrand competition").

[10]388 U.S. at 380-81. The Court explicitly looked to the "product market as a whole," intrabrand and interbrand, in applying the rule of reason to Schwinn's distribution through consignees under which Schwinn retained ownership and risk. *Id.* at 382.

For further evidence that the Court was fully aware of the alleged benefits to interbrand competition of Schwinn's distribution program, see Keck, The Schwinn Case, 23 Bus. Law. 669 (1968).

in this case, the effect of the territorial restrictions was to eliminate competition among dealers who were independent business entities.[11] Thus, the Court in both *Schwinn* and *Topco* invoked a per se rule against territorial restraints on resale because they are destructive of intrabrand competition, in spite of any beneficial impact they might have on intrabrand competition.

[11]Topco defended its use of territorial division in terms nearly identical to those employed by Schwinn and Sylvania:

> Topco essentially maintains that it needs territorial divisions to compete with larger chains; that the association could not exist if the territorial divisions were anything but exclusive; and that by restricting competition in the sale of Topco-brand goods, the association actually increases competition by enabling its members to compete successfully with larger regional and national chains.

United States v. Topco Associates, Inc., *supra*, 405 U.S. at 605. The Supreme Court's rationale for not considering Topco's economic justification for stifling intrabrand competition was applied not only to the horizontal division of territories in which members could retail Topco-brand goods, but also to territorial and customer restrictions on wholesaling by members of Topco. *Id.* at 612. The Court reasoned that:

> [l]ike territorial restrictions, limitations on customers are intended to limit intra-brand competition and to promote inter-brand competition. For the reasons previously discussed, the arena in which Topco members compete must be left to their unfettered choice absent a contrary congressional determination. United States v. General Motors Corp., supra; cf. United States v. Arnold, Schwinn & Co., supra . . . .

Id. Like the restraints held per se illegal in *Topco*, Sylvania's vertically imposed territorial restriction on Continental was intended to limit intrabrand competition and promote interbrand competition. Thus, the reasons given by the Court in *Topco* for not examining the "difficult economic problems" involved in attempting to balance losses in competition in one sector of the economy against alleged gains in another are equally relevant in this case.

The Supreme Court has held that it is not an appropriate judicial function to weigh the loss of intrabrand competition against an alleged gain in interbrand competition in determining whether the Sherman Act has been violated for two related reasons. The first is that courts are ill-equipped to resolve the complex economic problems involved in deciding whether elimination of intrabrand competition among dealers through territorial restrictions in fact produced compensating gains in interbrand competition among producers in a given case. As the Court said in *United States v. Topco Associates Inc., supra,* 405 U.S. at 609-10:

> The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another is one important reason we have formulated per se rules.

If the courts were required to review such issues under a "rule of reason," unpredictable ad hoc determinations as to what is or is not illegal under the Sherman Act would result. The Supreme Court suggested that a rule of reason should be a*pplied* in this area only if Congress were to decide that predictability is unimportant and that the courts should be "free to ramble through the wilds of economic theory in order to maintain a flexible approach." *Id* at 610 n.10.[12]

[12]The Court quoted Mr. Justice Black's explanation of the need for per se rules in such situations in Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958): "This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." 405 U.S. at 607.

The question the majority would submit to the fact finder is not whether the challenged conduct restrains competition, but whether the admitted restraint on intrabrand competition produces net economic benefits through enhanced interbrand competition. In the majority's words, "Whether some diminution in intrabrand competition is justified when it averts the loss of one competitor in an industry that is already oligopolistic should ultimately be a question for the finder of the facts."

The majority frankly acknowledges "that, as a matter of economic theory, there is a sharp divergence of opinion as to the alleged procompetitive effect of vertical territorial restrictions,"[13] but regards this disagreement as a reason for submitting the question

[13]Refutations of the claimed economic justifications for such vertical restraints can be found in Comanor, Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath, 81 Harv. L. Rev. 1419 (1968); Stone, Closed Territorial Distribution: An Opening Question in the Sherman Act, 30 U. Chi. L. Rev. 286 (1963); Schmitt, Antitrust and Distribution Problems in Tight Oligopolies—A Case Study of the Automobile Industry, 24 Hastings L.J. 849, 904-05 (1973). It is worth noting, for example, that there is substantial economic opinion that because territorial restrictions upon franchising dealers enhance product differentiation, such restrictions eliminate not only intrabrand competition, but competition between brands as well. Comanor, *supra,* at 1437; Zimmerman, *supra* note 7, at 1183-85; Schmitt, *supra,* at 906.

The economic justifications offered in support of vertical restraints are carefully examined and rejected by Judge Wisdom in Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 941-43 n.5 (5th Cir. 1975).

of the legality of such restraints to the fact-finding judge or jury. Majority Opinion n. 40. The majority's view of the judicial function is at odds with *Schwinn, Topco,* and the traditions and precedent on which they rest. It is also an invitation to a fruitless enterprise.

Sylvania's own expert witness, Professor Lee E. Preston, testified that in the present state of economic analysis it is not possible to determine the effect that changes in marketing practices at one level of a market will have at other levels.[14]

The majority quotes portions of the testimony of Professor Preston as "substantial evidence from which the jury might have reasonably concluded that Sylvania's location practice, rather than unreasonably restricting competitive market forces, actually had a procompetitive effect in that it enabled a marginal producer to achieve the status of a viable competitor in an industry threatened by oligopolistic tendencies." Majority Opinion at 29 & n.36. But Professor Preston did not testify that permitting Sylvania to limit dealer locations would enhance competition among producers. He made only the guarded assertion that "*if* we squeeze out the bottom firms . . . we would see a decline in competition," and "*if* this distribution policy or any particular distribution policy has the effect of strengthening Sylvania or any other smaller firm as a competitive force . . . then I think we have to look carefully at that policy as an element in com-

[14]*See also* Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp. Prob. 506, 508-09 (1965).

petition, indeed as a procompetitive policy . . . ." (emphasis added). Even this limited prediction was dependent on a number of assumptions, at least one of which the jury verdict found to be untrue; Professor Preston conceded that "[i]t would change the whole analysis" if Sylvania restricted the territories in which dealers would resell (R.T. 2910-11, 2917-18).[15]

Moreover, the limited value of Professor Preston's testimony to Sylvania was dissipated on cross-examination. The relevant testimony is quoted in the margin.[16] Professor Preston admitted there was no necessary connection between the use of location

[15]Other critical assumptions made by Professor Preston were that Sylvania did not set up location pattern in response to dealer requests or demands (R.T. 2904); that Sylvania did not use coercive means to prohibit a dealer in one territory from selling in another territory (R.T. 2905-07); that no dealer relied to a greater extent than normal on Sylvania for product (R.T. 2907-09); and that no excluded dealer was an especially vigorous competitor (R.T. 2929-30).

[16]Q. There could be other reasons, couldn't there, that Sylvania was able to maintain a 4 to 5 percent share of the market nationally besides the use of this particular distribution policy?
A. Oh, many other reasons, of course.
Q. In other words, quality of the product?
A. Of course.
Q. That could be a reason.
A. Yes.
Q. Promotion?
A. Yes.
Q. Advertising?
A. Yes.
. . . .
Q. So you are not saying that it necessarily follows that these particular distributions policies were or are necessary in order that Sylvania be able to maintain its present market share, are you?
A. No, I certainly am not.
Q. There is no way to tell, is there?

(footnote continued)

clauses and Sylvania's ability to maintain its present market share. He recognized that there were, "of course," many other reasons besides the locations practice that could explain Sylvania's four to five percent market share. Most important, as noted earlier, Professor Preston conceded that it is impossible to specify the impact of changes at the retail level on competition as the manufacturing level.

A judge or jury should not be expected to determine whether Sylvania's locations practice contrib-

A. I suppose given enough imagination and spending enough money we might conduct some kind of research to satisfy ourselves on it, but I don't think we would be able to.

. . . .

Q. There is really no way you can tell from the competitive effect at a retail level—you can't tell from that type of information what the competitive effect at the manufacturing level is going to be, can you?

A. They are not the same thing. I agree with that, that they are not the same.

Q. And there doesn't seem any direct correlation between the two?

A. Of course, if a firm, as I say, was pricing its product way out of competitive limits at the retail level, then it would show a decline in marketing shares at the manufacturing level.

Q. Didn't you say in this article, starting at page 508 in Duke Law Review:

"A closely related matter is the interaction between horizontal and vertical market relationships. The present state of economic analysis doesn't in general permit us to specify the impact of changes of one of several vertically related market levels upon structure and behavior at another."

A. Yes, you are quoting from my own writing.

Q. Right, and that was true at the time you wrote this article?

A. Yes.

Q. And it is still true?

A. I have been working on that since then and have written more about it. I think I have a few more ideas but they don't answer the questions yet.

Q. Basically that is still true?

A. Yes, I think that is right.

R.T. at 2955-58.

uted to Sylvania's success in interbrand competition when Sylvania's expert witness was unable to do so.[17] Because the interbrand effects of Sylvania's locations practice cannot be measured, a decision as to whether the net effect of the practice was procompetitive would be sheer guesswork. Finally, as has been shown, even if a net gain in purely economic terms could be established, such restraints could not be sustained consistent with *Schwinn, Topco,* and the purpose of the Sherman Act to maintain the competitive freedom of independent business units.

The second reason given by the Supreme Court in *Topco* in support of its holding that courts are unsuitable for the task of deciding whether intrabrand competition among independent dealers should be sacrificed to promote interbrand competition among producers, is that the question is one of public policy properly determined by Congress. The Court said, 405 U.S. at 611-12:

> If a decision is to be made to sacrifice competition in one portion of the economy for greater

[17] In fact, there is today no generally accepted body of economic doctrine that could serve as a guide in applying the Sherman Act and other antitrust statutes. *See, e.g.,* A. Neale, *supra* note 1, at 429; Bohling, *supra* note 2, at 1188; Bernhard, Competition in Law and in Economics, 12 Antitrust Bull. 1099, 1156-61 (1967); Dewey, The Economic Theory of Antitrust: Science or Religion?, 50 U. Va. L. Rev. 413, 430-31 (1964).

Commentators who set maximum productivity "as the sole, or central, objective for the law's rules of competitive behavior" and argue that the science of economics can provide standards for judgment in antitrust cases have been said by one economist to rely upon economic theory that "is, unfortunately, so elementary that it is, to a large extent, irrelevant." Bernhard, *supra,* at 1115-17, 1151. *See also* Samuelson, The Monopolistic Competition Revolution, in Monopolistic Competition Theory: Studies in Impact 105-36 (1967).

competition in another portion, this to is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

A judicial tradition, dating at least from Judge Taft's opinion in *Addyston Pipe* in 1898,[18] bars the courts from weighing conflicting economic predictions to determine the public interest in antitrust litigation.[19] Even when applying the "rule of reason," the courts have not inquired whether " 'on some ultimate reckoning of social or economic debits or credits' the conduct may be deemed beneficial. 'A value choice of such magnitude is beyond the ordinary limits of judicial competence . . . .' "[20]

This tradition is founded, as the Supreme Court said in *Topco,* both upon the inadequacy of the judi-

[18]United States v. Addyston Pipe & Steel Co., 85 F. 271, 283-84, 291 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899).

[19]A. Neale, *supra* note 1, at 435. Illustrative cases include United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927); Standard Oil Co. v. United States, 337 U.S. 293, 308-14 (1949); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963).

[20]Loevinger, The Rule of Reason in Antitrust Law, 50 U. Va. L. Rev. 23, 34 (1964), quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963).

cial process to deal with such disputes, and upon a conviction that questions of economic policy are for legislative rather than judicial determination. "[T]he courts have shown that they can get at the facts of agreement and restrictive intent but cannot find a truly justiciable issue in the choice between rival economic predictions."[21] As the Court said in *United States v. Singer Manufacturing Co.,* 374 U.S. 174, 196 (1963), "Whether economic consequences of this character warrant relaxation of the scope of enforcement of the antitrust laws, however, is a policy matter committed to congressional or executive resolution. It is not within the province of the courts, whose function is to apply the existing law."[22]

Finally, there is no substance in the majority's prophesy of catastrophic consequences to the competitive vigor of the economy if Sylvania's use of location clauses to impose territorial restrictions on independent dealers is held illegal per se.

The majority predicts that if sellers are prevented from restricting the areas in which purchasers may resell, "giant franchisees" might replace "loyal networks of small businessmen"; small manufacturers might perish due to an inability to attract dealers;

[21]A. Neale, *supra* note 1, at 440.

[22]Professor Kingman Brewster, Jr., wrote that "the values served by not having courts act like legislative bodies are just as important to the society as are the values which might be served by having every case decided by economically rational but essentially *ad hoc* determinations of the public economic interest. The net goodness or badness of effects is not a proper subject of judicial determination." Brewster, Enforceable Competition: Unruly Reason or Reasonable Rules?, 46 Am. Econ. Rev. 482, 487 (1956).

and larger manufacturers might eliminate franchisees by integrating vertically. The end result of all this would be "the insidious evil of total monopolization." Majority Opinion at 27.

The majority's concerns are speculation.

They rest, moreover, on a false premise. The majority refers to "franchising" as if it were a unitary phenomenon uniformly affected by *Schwinn* and this case. But there are many types of franchising. Trademark franchising, or the franchising of an entire business or service, for example, "perhaps the most dynamic segment of contractual systems," does not involve the sale of a product, and may not be subject to *Schwinn's* restrictions at all.[23]

[23]D. Thompson, Contractual Marketing Systems 21 (1971). *See also* Pollack, Alternative Distribution Methods After Schwinn, 63 Nw. U. L. Rev. 595, 601-02 & n.35 (1968); Jones, *supra* note 4, at 741-42; FTC, Report of Ad Hoc Committee on Franchising, at 31 (1969). In the latter report it is said with respect to the relevant Supreme Court decisions that:

> In laying down these principles, the Court was not directing its attention to arrangements involving the franchising of an entire business or service which is promoted nationally under a trademarked name and associated in the public mind with a highly distinctive external appearance or with a standardized uniform operation. There is no indication that the Court intended these decisions to apply across the board to trademark-licensing arrangements, also frequently subsumed under the term franchising, in which the licensor imposes restrictions on the licensees to ensure the identity of origin, quality, and unformity of the trademarked product and thus preserve his rights in the trademark. Nothing in any of the Court's four opinions would suggest that even in the case of outright sales of trademarked products the Court intended to modify established trademark law which requires the trademark owner to maintain sufficient control over his licensees to assure that his mark will not be deemed abandoned and that the licensee will apply the mark either to the same products or to products of substantially the same quality that the public in the past has associated with the mark.

The majority's suggestion that elimination of territorial restrictions might lead to the creation of large franchisees with several outlets, and that this result would be undesirable, is nothing more than an argument against competition. Chain stores cannot be prohibited in the name of free competition. If chain franchisees succeed in free competition among independent businessmen making their own decisions, and without predatory conduct, neither the letter nor spirit of the Sherman Act will be offended.

The majority offers no evidence to support its assertion that producers might be unable to develop a distribution system unless they are permitted to guarantee dealers a protected market; and there is substantial evidence to the contrary. "[H]undreds of manufacturers have for years been successfully operating under antitrust decrees forbidding precisely the same type of product control held per se illegal in *Arnold, Schwinn & Co.* Injunctive provisions of this type have long been standard in Department of Justice consent and litigated decrees."[24]

"Predictions of vertical integration" because of antitrust condemnation of vertical restrictions "have proved to be remarkably unreliable in the past."[25] It is unlikely that they would be more reliable in this instance. Producers distribute through independent dealers rather than through their own employees

[24]Williams, Distribution and the Sherman Act—The Effects of General Motors, Schwinn and Sealy, 1967 Duke L.J. 732, 735. *See also* Zimmerman, *supra* note 7, at 1186-87 & n.8.

[25]Schmitt, *supra* note 13, at 911-12; *see* Williams, *supra* note 24, at 735.

because it is economically advantageous to do so. Vertical integration by a producer into retail distribution is particularly uneconomic. Distribution is a relatively low profit activity.[26] Both capital and operating costs are high.[27] The product "mix" required in most retail operations cannot be furnished by a single producer: "Nobody is going to set up a distribution system to sell toothpaste, no matter what the antitrust laws say."[28] Television sets also may be among the "vast numbers of commodities" for which "it is just hopelessly inefficient to set up a distribution system to handle that commodity only."[29] Continental, for example, sold the products of several manufacturers. Moreover, independent businessmen often bring to distribution qualities such as a "sense of responsibility, industriousness, attention to costs and desire to earn a profit," which are not ordinarily found in salaried employees.[30] Finally, franchising offers significant advantages in avoiding local labor problems, administrative burdens, and a variety of additional taxes.[31] These substantial economic advantages of franchising will remain even if producers are pre-

[26]Preston, *supra* note 14, at 512.

[27]"[T]he cost of automobile distribution, in labor and capital, is almost as great as the cost of manufacturing them." Note, *supra* note 8, at 110. *See also* Schmitt, *supra* note 13, at 870-71.

[28]Panel Discussion, *supra* note 7, at 57 (remarks of Donald Turner).

[29]*Id.*

[30]Jones, *supra* note 4, at 724; *see, e.g.*, Zimmerman, *supra* note 7, at 1186.

[31]*See, e.g.*, H. Brown, Franchising—Realities and Remedies vii-viii (1973); Jones, *supra* note 4, at 723-24; Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795, 834 (1962).

vented from dictating the territory in which independent dealers resell. The only reasonable prediction, therefore, is that if the district court were affirmed in this case, producers would continue to distribute through independent dealers rather than integrate forward.[32]

[32]*See Schmitt, supra* note 13, at 912-13; Stone, *supra* note 13, at 315-316; Zimmerman, *supra* note 7, at 1186-87; Panel Discussion, *supra* note 7, at 55-56 (remarks of S. Jerry Cohen); *id.* at 57-58 (remarks of Donald Turner); Note, *supra* note 8, at 109-10.

Shortly after the Supreme Court's *Schwinn* decision, Arnold, Schwinn & Co. took over the functions of its nine independent wholesale distributors. The case, however, is not typical. The company had few independent dealers; 75% of its distribution was by consignment which was upheld by the *Schwinn* decision. In the extensive literature on *Schwinn* published in the decade since that decision, no evidence is offered that forward integration by producers into distribution has been accelerated by the Supreme Court's ruling. The automobile and oil industries, which account for two thirds of all franchising sales, are examples of industries which have not integrated following antitrust decisions requiring the abandonment of vertical restraints on independent dealers. Such integration is unlikely, in the automobile industry, in the future. Schmitt, *supra* note 13, at 913. In the oil industry, the substantial diseconomies that would result from integration (Miller, Exclusive Dealing in the Petroleum Industry: The Refiner-Lessee Dealer Relationship, 3 Yale Econ. Essays 223, 232 (1963)) are a significant disincentive to distribution through company-owned outlets. *See* Comanor, *supra* note 13, at 1435-36 & n. 32.

The following are illustrative of judgments that the net effect of the *Schwinn* prohibition of vertical territorial restraints will be to benefit small independent businesses:

> Therefore, all this decision is saying, and what it really means is that a person in a dominant position cannot have the benefits accruing to a franchise system, and at the same time retain the benefit of being able to control the ultimate disposition of those goods.
>
> So you have to make a decision, either you have an independent distribution system or you don't. . . . In the long run it [*Schwinn*] will probably be more beneficial to the smaller businessman than it will be harmful.

Panel Discussion, *supra* note 7, at 56 (remarks of S. Jerry Cohen).

> Therefore, with the elimination of the location clause from franchise contracts, the freedom of dealers as to where and to whom they will sell will be increased. This probably will lead only to sporadic changes in the distribution pattern and will

DUNIWAY, Circuit Judge (dissenting):

I dissent solely on the ground that, as Judge Kilkenny demonstrates in parts I and II of his dissenting opinion, the case of *United States v. Arnold, Schwinn & Co.*, 1967, 388 U.S. 365, is squarely in point. I agree with Judge Browning when he says that "[t]his should end the matter for an intermediate appellate court." I express no views as to the conflicting policy arguments that appear in the respective opinions of Judges Browning, Ely and Kilkenny. I cannot, however, refrain from making one small observation. I am puzzled by the notion that because the courts are not very well equipped to decide between conflicting notions of economic policy, they should pick one side of such an argument and erect it into a rule of per se illegality.

not affect the viability of the franchised distribution system. The principal result of the demise of the location will be the preservation of the dealer's freedom to do business. At least in some areas, intrabrand competition will be enhanced, and the manufacturers' stifling of intrabrand competition will be replaced by the operation of market forces. Schmitt, *supra* note 13, at 909.

Appendix B

In the United States District Court
for the Northern District of California

Civil No. 44251-TCC

John P. Maguire & Co., Inc., a corporation,
Plaintiff,
vs.
Continental T. V., Inc., a corporation, et al.,
Defendants.

Continental T. V., Inc., a corporation, et al.,
Cross-Claimants,
vs.
John P. Maguire & Co., Inc., a corporation, et al.,
Cross-Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court having granted Cross-claimants' motion for equitable relief to the extent set forth in the judgment entered herein on December 11, 1970, and the parties having stipulated to entry of Findings of Fact and Conclusions of Law after said date, the

court hereby enters and files, in support of the injunction issued, the following Findings of Fact and Conclusions of Law:

A. *FINDINGS OF FACT*

1. Sylvania Electric Products, Inc., a corporate subsidiary of General Telephone and Electric., manufactures and markets, through its Home Entertainment Products Division, television sets, stereo and radio units and related equipment. These products are shipped in interstate commerce throughout the United States. Prior to 1963, it sold its products primarily through distributors—some of whom were owned by Sylvania—with the distributors in turn selling to retailers. In 1962, as part of a reorganization of its Home Entertainment Products Division, it adopted a new marketing program pursuant to which it phased out some of its distributorships and in their place used a "straight line distribution" system (SLD) pursuant to which sales were made directly to franchised dealers who in turn sold to the consumer. By 1965, Sylvania ranked as the nation's 8th-9th largest manufacturer and seller of color sets, and enjoyed approximately 4-5 per cent of the national market therein.

2. Cross-claimants are a group of affiliated corporations in substantially common ownership which did business under the name "Continental T. V.". They are collectively referred to herein as "Continental". George Shahood and his wife were the principal owners of all of the corporations and Mr. Shahood was the principal operating officer. Continental T. V. began business in 1960 in San Jose, California, as a retail dealer of television receivers, radios and related products. Its sales territory during its initial period of operation included most of Santa Clara County. Its product was largely television receivers manufactured by Muntz T. V., Inc. Through the first four years of its operation, Continental enjoyed considerable success, and early in 1964 it replaced its downtown San Jose store with a larger, more prestigious facility in the Stevens Creek area, a growing suburb in San Jose. Throughout this four-year period Continental had no credit arrangement for floor financing of its inventory either with Muntz, any other manufacturer, or any bank or credit institution, and handled its customer credits largely through Crocker-Citizens National Bank in San Jose.

3. Shortly after Continental opened its new store in Stevens Creek, Mr. Lee French, Sylvania's district sales manager for the area, began regular negotiations with Continental in an effort to persuade it to become a retail outlet for Sylvania products. Successful in his effort to obtain Continental as a Sylvania dealer, French proposed and Continental agreed to utilize Sylvania's inventory finance plan—the Maguire plan—in connection with its purchases of Sylvania products.

4. John P. Maguire & Co., Inc., a national finance company, had previously negotiated and agreed with Sylvania upon a financing arrangement whereby Maguire would handle commercial paper in the form of promissory notes and trust receipts and other

credit instruments of Sylvania dealers on orders for Sylvania products, the credit limits of the dealer to be approved by Sylvania. In addition to Continental's execution to Maguire of these credit instruments, Mr. and Mrs. Shahood executed a personal guarantee of Continental's obligations.

5. This suit was initially filed by Maguire on the obligations of Continental which Maguire at Sylvania's request had declared past due and on which it sought judgment, foreclosure and repossession of the Sylvania merchandise held by Continental. In its cross-claim, Continental named Maguire as a party and co-conspirator with Sylvania, alleging violations of the federal antitrust laws, breach of contract, and willful and malicious injury to the business and property of Continental. Continental also prayed for injunctive relief, requesting the Court to enjoin the alleged violations and to reinstate the Sylvania franchise without the challenged restrictions.

6. The issues were tried to a jury and the jury returned a verdict for Continental on its claim that Sylvania had engaged in a contract, combination or conspiracy with its dealers in the form of a locations restriction to enforce its distribution policy for the purpose of eliminating intrabrand competition among Sylvania dealers; damages were fixed by the jury accordingly. With respect to Continental's claim pertaining to retail price maintenance by Sylvania, the jury returned a verdict finding Sylvania had not engaged in a contract, combination or conspiracy in violation of the antitrust laws as regards location

restrictions and price fixing taken together as an integral part of a single distribution policy. The jury further found against Continental on the claim of willful and malicious injury to its business and property and found for Maguire on all counts. The breach of contract claim was abandoned during the course of the proceedings. Shortly after the conclusion of the trial the Court heard cross-claimants' motion for injunctive relief. After consideration of the pleadings, memoranda, evidence, answers given by the jury to interrogatories propounded to them by the Court, and the oral argument of the parties, and good cause appearing therefor, a limited injunction was issued.

7. At the time Continental was first recruited as a Sylvania dealer, the sales manager for the area, Mr. French, told Continental it would be subject to Sylvania's "straight line distribution" policy which was explained in Sylvania's sales manual. The manual states, inter alia, that the "franchise contains a good profitable selling climate by creating 'elbow room' in a sensible territory based on market and dealer potential. 'Same brand' competition is eliminated." The manual further states that "Sylvania wants fewer dealers . . ." and that "S.L.D. does not promiscuously franchise leaders without first studying their size, location and effect on the market (as well as other Sylvania dealers in the area)." By its very terms, the SLD plan imposed on the retail dealers restrictions as to locations from which they could resell merchandise purchased by them from Sylvania. Although

retail sales of Sylvania brand merchandise could be made to anyone, the sales could be made only from the store location approved by Sylvania. Moreover, pursuant to the SLD policy existing dealers, including Continental, seeking additional locations for floor display and retail sales of Sylvania products were required to secure the prior approval of Sylvania.

8. Continental T. V. began expanding and affiliated corporations were formed to lease and operate stores at other locations, most of them modeled after the Stevens Creek facility. In compliance with Sylvania's location restriction policy, as each new store was opened, Continental, prior to the display of Sylvania products, advised French of the location of the new store and of Continental's intention to sell Sylvania merchandise therefrom. With the exception of the Sacramento location, French and/or his immediate supervisor, Carroll, granted Continental approval to sell Sylvania products from the new locations. By reason of the inherent limitations respecting advertising and promotion and delivery and service of sets sold, the territory of a retail dealer for sales was, for all practical purposes, limited to a radius of 25-50 miles from a dealer's store location.

9. Initially, Continental and its affiliates joined the dealership contract and complied with the location restrictions. Its business continued to prosper as is evidenced by the fact that it opened five new stores in 1965, its sales exceeded $1,000,000 per year and it enjoyed a $300,000 line of credit with Sylvania. Continental's relations with its bank, Crocker-Citizens

National Bank, were excellent and of some four years standing. As regards its relations with Sylvania, Continental had experienced some disagreements over advertising allowances, defects appearing in some of the Sylvania products and freight damage in shipping the products. Also, Maguire was critical of Continental's method of payment as well as credit maturities on Continental's obligations to it, with the result that Maguire's books reflected that Continental was, at times, in arrears. However, these problems were not sufficiently serious to have any material effect on the working relationship of the parties. Indeed, at the annual Sylvania Dealer Convention in Chicago in June, 1965, Sylvania vigorously sought and obtained from Continental an order for $220,000 of its products and also increased the latter's line of credit to $350,000.

10. Prior to the Chicago convention and order, Continental had heard through French that Sylvania was contemplating franchising another dealer, Young Bros., at a location on Geary Street in San Francisco, about a mile from Continental's store. Continental, believing that such a franchise would violate Sylvania's declared "elbow room" policy, advised French that if a franchise were granted to Young Bros., Continental would have to reappraise its Sylvania needs for its San Francisco store. French later told Continental that Young Bros. would not be franchised. In fact, however, Sylvania's higher authority had decided to grant the franchise. Sylvania deliberately withheld disclosure of its decision to do so

until after it had obtained Continental's large order for Sylvania products at the Sylvania Dealer Convention in Chicago in June, 1965. It was not until after Continental had placed the order that Sylvania informed Continental that a Young Bros. franchise had been granted.

Mr. Shahood thereupon cancelled Continental's order and left Chicago to attend the Philco Convention in Puerto Rico. However, on July 3, 1965, at Sylvania's urging, Continental reordered some of the merchandise which had been covered by the cancelled convention order.

11. In March, 1965, Shahood had stated to French that Continental desired to enter other California markets, in particular, Sacramento and Vallejo. With reference to the Sacramento location, French, in August, 1965, advised Shahood that if Continental wanted franchise approval for the sale of Sylvania products in Sacramento, the approval would have to be negotiated with Mr. Hines, Sylvania's district sales manager in Sacramento. In compliance with Sylvania's policy, Continental initially agreed not to sell Sylvania brand merchandise from a Sacramento location without Sylvania's prior approval.

12. Shahood, pursuant to his common practice with regards to a new location, organized an affiliate, in this instance, SAM Industries, Inc., and through it leased a location in Sacramento about a mile from Handy Andy, also a Sylvania dealer. In early September, 1965, (prior to September 5, 1965), Shahood

advised French of the address of the Continental location in Sacramento and requested approval for the sale of Sylvania products therefrom. However, French advised Shahood that approval would not be granted for the Sacramento outlet. Thereafter, and prior to September 5, 1965, Shahood advised French that he had moved Sylvania brand merchandise to the Sacramento location and again requested approval, stating however, that if approval was not granted, Continental would remove the Sylvania merchandise from the Sacramento store.

13. On September 7, 1965, French advised Shahood that due to prior "commitments" which Sylvania had with Handy Andy, it was impossible for Sylvania to franchise Continental in Sacramento. Thereupon, Continental, after consultation with corporate counsel on September 7, 1965, determined that it would no longer comply with Sylvania's location restrictions and would sell merchandise owned by it where it chose, with or without Sylvania approval. Sylvania demanded that Continental remove all Sylvania brand merchandise from its Sacramento location, but Continental refused and continued until the date of repossession to sell Sylvania products from Sacramento.

14. On September 16, 1965, Sylvania reduced Continental's credit line to $50,000, cancelled Continental's orders which had been previously accepted and approved for credit, rejected other Continental orders which were then pending, rescinded payment

terms favorable to Continental, and directed its sales with Continental and isolate them from Shahood.

Additionally, Sylvania made demands on Conti- and credit personnel to cut off all communication nental for sums substantially in excess of the amounts then due from Continental. Sylvania also refused to honor credits due to Continental and the latter ultimately brought a state court action to recover them. Faced with this pattern of conduct by Sylvania, Continental on September 24, 1965, notified Maguire and Sylvania that all obligations maturing would be paid by check to Continental's attorneys, pending settlement of difficulties. Thereafter, Maguire on request of Sylvania accelerated all payments under the obligations of Continental and filed this suit, repossessed the merchandise in Continental's possession, levied attachments on Continental's places of business and bank account, and caused Continental's San Jose stores and central warehouse to be chained closed. Further, on October 8, 1965, Crocker-Citizens National Bank terminated Continental's consumer financing program and on October 13, 1965, by reason of the levy of attachment, called Continental's commercial loan. On October 13, 1965, Sylvania terminated Continental's franchise. On the day after the repossessions and attachments Sylvania contacted Philco, Continental's other major supplier, and informed it of the lawsuit, repossessions, attachments and the closing of Continental's stores and warehouse.

15. Sylvania introduced evidence in justification of this action. First, prior to the June 1965 Conven-

tion of Sylvania, heretofore mentioned, at which Sylvania increased Continental's line of credit to $350,000 and accepted the latter's order for $220,000 of Sylvania products, Sylvania had heard that Shahood had a criminal record. It ordered a Dun and Bradstreet credit report sometime later. However, Shahood himself in November 1964 voluntarily reported to Mr. French and Mrs. Barnes, Sylvania's Sales and Credit representatives respectively, that he had been convicted of some criminal offenses. Mrs. Barnes advised Shahood at that time that his existing credit line was based on his present status rather than on his past conduct and neither she nor Mr. French reported the matter to higher authority at Sylvania. On or about August 10, 1965, Sylvania received a credit report from Dun and Bradstreet disclosing that Shahood had been convicted of writing checks on a bank in which he had insufficient funds and also a military conviction while in the Marine Corps for misappropriation of government funds. Second, Continental had substantially increased its obligations to Philco by a capital loan and a $500,000 order for Philco products. Third, that Continental had failed to pay past due maturities on Sylvania products that were held by Maguire for Sylvania. And, finally, that Continental had on September 24, 1965, advised Sylvania that all of its future obligations would, as they matured, be paid by check to Continental's attorneys pending settlement of their differences. I find that none of these reasons were the grounds upon which Sylvania acted.

16. I find that the action of Sylvania set out in paragraph 14, supra, was taken pursuant to the contract, combination or conspiracy alleged by Continental and was part and parcel thereof and at the instance of Sylvania's co-conspirator Handy Andy; and as a result thereof Continental was prevented from selling its Sylvania brand products in its store in Sacramento. Additionally, said conspiracy resulted in the number of Sylvania franchises in Sacramento being reduced from seven in 1963 to three in 1965 with Handy Andy selling all of the Sylvania Color TV sets sold in Sacramento and 80 percent of the black and white ones during the first six months of 1966. The other two dealers though authorized to sell color sets sold only a small amount of black and white ones. The total sales of Sylvania color sets was $628,502 for the first seven months of 1966 while black and white sale of Sylvania sets were only $50,413.

17. The evidence also shows that Robert E. Lee, a Sylvania franchised dealer in Hayward, California, moved some of his Sylvania brand products to his Berkeley store for sale purposes but without Sylvania approval. His franchise was terminated on this ground in June, 1964.

B. *Conclusions of Law*

1. This Court has jurisdiction over the case and the parties herein pursuant to the provisions of the Act of July 2. 1890, entitled "An Act To Protect Trade and Commerce Against Unlawful Restraints

And Monopolies", commonly known as the Sherman Act, 15 U.S.C. Sec. 1, et seq.

2. Sylvania Electric Products, Inc., is and has been engaged in trade and commerce among the several states during all times material to this proceeding.

3. Sylvania, during the time involved herein, and in violation of Section 1 of the Sherman Act, did engage in a contract, combination or conspiracy with its retail dealers, including Handy Andy and Continental, pursuant to which it restricted and enforced its location distribution policy and imposed a system of location restraints upon its retail dealers limiting for all practical purposes the areas in which they could display and sell Sylvania brand products which the dealers had purchased from Sylvania and which were owned by them.

4. As a proximate result of Sylvania's conduct as above described, Continental sustained damage to its business and property as found by the jury. Moreover, equitable relief having been granted in the Judgment heretofore entered on the 11th day of December, 1970, the Court deems it necessary to enter in support thereof, the Findings of Fact and Conclusions of Law contained herein.

5. The foregoing restraints are *per se* violations of Section 1 of the Sherman Act, inasmuch as Sylvania made sales to its retailers upon "condition, agreement or understanding limiting the retailers' freedom as to where and to whom it will resell the

products", these sales having been made "subject to territorial restrictions upon resale". *United States v. Arnold Schwinn & Co.,* 388 U.S. 365, 378-379 (1967).

6. The facts of this case do not bring it within the purview of *White Motor Co. v. United States,* 372 U.S. 253 (1963). Sylvania was not a "newcomer, seeking to break into" the television market. It was not a "failing company", *Schwinn, supra,* at 370; nor were the restrictions imposed "allowable protections against aggressive competitors", *White Motor, supra,* at 263. It is apparent that the territorial restrictions here involved were the result of a contract, combination or conspiracy with willing dealers to serve the interests of both Sylvania and the dealers, rather than the unilateral imposition "upon unwilling distributors by the manufacturer to serve exclusively his own interests". *White Motor, supra,* at 267 (Brennan, J., concurring).

7. Continental is therefore entitled to an injunction perpetually enjoining and restraining Sylvania, its agents and employees from directly or indirectly imposing, inducing or securing any condition, agreement or understanding either by oral or written statement or by acts of retaliation that limits the freedom of Continental as to where or to whom it may display or resell products sold by Sylvania and acquired by Continental, provided however that nothing herein shall require Sylvania to sell any products to Continental or restrain Sylvania from unilaterally refusing to sell products to Continental. Except as

hereinabove expressly provided, Continental's request for equitable and injunctive relief is hereby denied.

It Is Hereby Ordered that the foregoing Findings of Fact and Conclusions of Law be entered and filed in support of the Judgment heretofore entered on the 11th day of December, 1970.

Dated: This 11th day of February, 1971.

/s/ Tom C. Clark
Honorable Tom C. Clark
Sitting, by designation, as U. S. District Judge, U. S. District Court

Appendix C

The following provisions of the Sherman Act[1] are involved:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $50,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[1]Act of July 2, 1890, c. 647, 26 Stat. 209; 15 U.S.C.A. §§ 1-7. Subsequent amendments up to and including June 30, 1967 only are included herein.

. . .

SEC. 8. That the word "person," or "persons," whenever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

The following provisions of the Clayton Act[2] are also involved:

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive of an Act

[2]Act of October 15, 1914, c. 322, 38 Stat. 730; 15 U.S.C.A. §§ 12-27. Subsequent amendments only through June 30, 1967 are included herein.

entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

. . .

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

. . .

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently

granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Supreme Court, U. S.
FILED
DEC 6 1976
MICHAEL RODAK, JR., CLERK

JOINT APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC, INC. and S.A.M. INDUSTRIES, INC., *Petitioners,*

VS.

GTE SYLVANIA INCORPORATED, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed July 8, 1976
Certiorari Granted October 18, 1976

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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DOCKET ENTRIES

Document	Entry
Complaint filed by John P. Maguire & Co., Inc. v. Continental T. V., Inc.; A & G Sales, Inc.; SYL-PAC, Inc.; JOHN DOE CO.; George N. Shahood and Margaritha H. Shahood, defendants; summons issued; writ of attachment issued	October 12, 1965
Answer filed by defendants Continental T. V., Inc., A & G Sales, Inc., Sylpac, Inc., S.A.M. Industries (sued as John Doe Co.), George N. Shahood and Margaritha H. Shahood; counterclaim and cross-claim filed by Continental T. V., Inc., A & G Sales, Sylpac, Inc. and S.A.M. Industries against John P. Maguire & Co., Inc. and Sylvania Electric Products, Inc.	November 22, 1965
Order filed that Sylvania Electric Products, Inc. be made a defendant to the cross-claim and that summons be served	December 6, 1965
Undertaking on Attachment (claim and delivery) filed in the sum of $155,-138.66; return on executed attachments (claim and delivery) filed; undertaking for release of attachment in the sum of $95,000 filed by defendants	January 11, 1966
Reply of J. P. Maguire & Co., Inc. to counter-claim filed	January 25, 1966
Stipulation and Order filed dropping parties, adding a party and allowing the filing of an amended cross-claim	March 4, 1966
Defendants and Cross-complainants' demand for jury trial filed	April 8, 1966

Document	Entry
Answer of cross-defendants, John P. Maguire & Co., Inc. and Sylvania Electric Products, Inc. to cross-claim filed	April 22, 1966
Notice of Motion and Motion by John P. Maguire & Co., Inc. and Sylvania Electric Products, Inc. for Summary Judgment (or Partial Summary Judgment) filed	April 30, 1970
Cross-claimants' Memorandum of Points and Authorities in Opposition to Cross-defendants' Motion for Summary Judgment (or Partial Summary Judgment) filed, with Exhibits attached	June 1, 1970
Conference held before Justice Tom C. Clark, Case ordered for Pre-trial July 20, 1970 and for Jury Trial September 21, 1970	June 23, 1970
Pre-Trial Order No. 2 filed (Justice Tom C. Clark)	July 15, 1970
Seconded Amended Cross-claim for restraint of trade and damage to business and property filed by cross-claimants, Continental T. V., Inc., A & G Sales, Sylpac, Inc. and S.A.M. Industries, Inc.	July 16, 1970
Pre-Trial Conference held and trial on cross-claims set for September 21, 1970 (Justice Tom C. Clark)	July 20, 1970
Order filed denying Motion for Summary Judgment (or Partial Summary Judgment) by John P. Maguire & Co., Inc. and Sylvania Electric Products, Inc.	July 29, 1970

Document	Entry
Answer filed by cross-defendants John P. Maguire & Co., Inc. and Sylvania Electric Products, Inc. to Second Amended Cross-claim	August 28, 1970
Jury Verdict Returned and filed	November 6, 1970
Cross-defendants' Notice of Motion and Motion for Judgment notwithstanding the verdict, or in the alternative for a new trial filed	November 16, 1970
Cross-claimants' Notice of Motion and Motion for Findings of Fact and Conclusions of Law respecting equitable relief claimed filed	November 24, 1970
Judgment entered, filed December 11, 1970, pursuant to Jury Verdict, that cross-claimants have and recover from cross-defendant Sylvania Electric Products, Inc., the sum of $1,774,515.00; said sum being the verdict of the Jury trebled as a matter of law, plus $18,000 costs, together with interest on said sums at 7% per annum from date of entry of judgment	December 18, 1970
Order filed denying cross-defendant's motion for judgment notwithstanding the verdict and for a new trial; Findings of Fact and Conclusions of Law filed	February 16, 1971
Notice of Appeal from designated portions of judgment filed by cross-defendant Sylvania Electric Products, Inc.	March 2, 1971
Record on Appeal transmitted to the United States Court of Appeals for the Ninth Circuit	April 9, 1971

Document	Entry
Judgment of the United States Court of Appeals for the Ninth Circuit pursuant to Rule 36 of the Federal Rules of Appellate Procedure entered affirming the judgment of the United States District Court	May 9, 1974
Opinion of the United States Court of Appeals for the Ninth Circuit filed	May 10, 1974
Corrected order of the United States Court of Appeals for the Ninth Circuit filed withdrawing the majority and dissenting opinions filed on May 9, 1974 and setting the case for rehearing en banc	December 19, 1974
Opinion of the United States Court of Appeals for the Ninth Circuit filed, after rehearing en banc, reversing the judgment of the United States District Court and remanding for a new trial	April 9, 1976
Mandate of the United States Court of Appeals for the Ninth Circuit reversing the judgment entered in the United States District Court and remanding for new trial filed	May 4, 1976
Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit filed in the Supreme Court of the United States by petitioners, Continental T. V., Inc., A & G Sales, Sylpac, Inc. and S.A.M. Industries, Inc.	July 8, 1976
Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit granted by the Supreme Court of the United States	October 18, 1976

SYLVANIA'S REQUESTED JURY INSTRUCTIONS
(Citations Are To Clerk's Transcript (CT))

[1157] Sylvania and Maguire's Requested Jury Instruction No. 29 (Revised)

If you find that any action taken by Sylvania with respect to new locations or territories was not pursuant to any contract, combination or conspiracy as I have defined those terms, but was simply the unilateral exercise by Sylvania of its own policies with respect to franchising of dealer locations, then you must find that there has been no violation of the antitrust laws and you must bring in your verdict for Sylvania and Maguire with respect to Continental's antitrust claims. If, on the other hand, you determine, in accordance with my previous instructions, that there was a contract, combination or conspiracy between Sylvania and some other party designed to achieve or enforce sales distribution restrictions on dealer locations, you should then proceed to consider whether such locations practice is lawful or unlawful under the instruction I will now give you.

If, in accordance with my previous instructions, you find that Sylvania and some other person or persons engaged in a contract, combination or conspiracy to establish or enforce sales distribution restrictions on locations of Sylvania dealers, then you must consider whether or not such restrictions constitute an unreasonable restraint of competition and trade in the Northern California or Sacramento market for television products. If they do constitute such an unreasonable restraint of competition, then the prac-

tice would be unlawful; if not, then whatever your finding on the contract, combination or conspiracy **[1158]** issue, you must find that the practices are not unlawful.

In this connection you should understand once again that the purpose of the antitrust laws is to promote competition, but not to strike down every conceivable contract or joint enterprise which might have some restraining effect on competition or trade. Every agreement concerning trade to some extent restrains. But the true test of legality is whether the restraint imposed is such as really regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question you must consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable, the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be obtained. Thus, it is that the antitrust laws prohibit only those restraints of trade which unreasonably restrict or suppress competition.

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) (Brandeis, J.)
Standard Oil Co. v. United States, 221 U.S. 1 59-62 (1911)

Given: .....

Refused: .....

Given as Modified: .....

.....

United States District Judge

[1159] SYLVANIA AND MAGUIRE'S REQUESTED JURY INSTRUCTION No. 30 (REVISED)

In determining the question of the reasonableness or the unreasonableness of the challenged location practice, you should understand that the antitrust laws specifically recognize the right of a manufacturer, such as Sylvania, which does not dominate a particular market, to actually agree with a particular dealer not to authorize sales of the manufacturer's products by another dealer from locations within the territory served by the first dealer. Therefore, without in any way intimating whether such an agreement exists in this case, I instruct you that if you were to find that Sylvania did agree, whether explicitly or tacitly, with a dealer, such as Handy Andy, not to franchise or permit the sale of television products by another dealer, such as Continental, in the area served by the first dealer, i.e., Sacramento, such an agreement would be a reasonable restraint of trade, and Sylvania would also be entitled to take any steps reasonably necessary to fulfill the commitment that it had made pursuant to such an agreement, if any, even if this meant keeping Continental out of the Sacramento market. Therefore, if the evidence shows nothing more than such an agreement between Sylvania and Handy Andy and steps taken by Sylvania to fulfill its commitments under that agreement, you must find that the challenged locations practice **[1160]** does not violate the antitrust laws.

Given: .....

Refused: .....

Given as Modified: .....

.....

United States District Judge

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, 416 F.2d 71 (9th Cir. 1969)
Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957)
U.S. v. Arnold Schwinn & Co., 388 U.S. 365 (1967)
Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir. 1963)
Top-All Varieties, Inc. v. Hallmark Cards, Inc., 1969 Trade Cas. ¶72,850 (S.D. N.Y. 1969)

[1269] SYLVANIA AND MAGUIRE'S
REQUESTED JURY INSTRUCTION NO. 30C
[REPLACES 30B]

Furthermore, in evaluating the question of whether or not the challenged location practice unreasonably restrains competition, you should also understand that under the antitrust laws it is lawful for a manufacturer, in franchising a particular dealer or dealers to be retail dealers in the manufacturer's products, to designate the location or locations of the place or places of business for which said dealer or dealers are franchised. It is also lawful for the manufacturer to decline or refuse to grant a dealer's request for a franchise at a different location.

Given: .....

Refused: .....

Given as Modified: .....

.....
United States District Judge

U.S. v. Arnold, Schwinn & Co., 291 F.Supp. 564, 565-66 (N.D. Ill. 1967)

[1161] SYLVANIA AND MAGUIRE'S
REQUESTED JURY INSTRUCTION NO. 31 (REVISED)

Therefore, if you find a contract, combination or conspiracy to establish or enforce sales distribution restrictions on locations at which Continental and/or other dealers may sell products, you must further resolve the question of whether such contract, combination or conspiracy, if any, unreasonably or unduly restrained or suppressed competition or the free flow of commerce in the Northern California or Sacramento markets for television products. In resolving this question, it is proper for you to consider, to the extent justified by the evidence, various factors relating to the purpose, operation and effects of such practices. Thus, if such restrictions on locations, if any, had the effect of eliminating all competition among Sylvania dealers so that a potential Sylvania customer would have no choice of dealers from which to purchase television products, this fact would tend to show that the practice unreasonably restrained competition unless such suppression of intrabrand competition were, in your judgment, outweighed by benefits, if any, to interbrand competition. On the other hand, if the practices merely had the effect of reducing, but not eliminating, competition between Sylvania dealers without prohibiting such dealers from selling in territories more proximate to other dealers and thereby allowing customers reasonable alternatives between Sylvania dealers, this factor would tend to show that the practice did not unreasonably restrain or injure competition, particularly if such practice was adopted for the legitimate pur-

pose [1162] of increasing Sylvania's competitive strength against other manufacturers of television products.

Other factors which would tend to support a finding of an unreasonable restraint on competition would be a showing that in the general markets for television products in Northern California or Sacramento the restrictions on location of Sylvania's dealers resulted in a substantial lessening of the number of television outlets and brands available to customers in such markets, or in a materially significant lessening of competition among retail television dealers in such markets, or in a substantial foreclosure of the number of retail outlets available to other manufacturers, or in a substantial lessening of the number of television sets available to customers in such markets, or in a deterioration in quality of television products available in such markets, or in an artificially high price level for television products in such markets. Further facts might be a showing that the practice was part of an effort to drive out products of competing television manufacturers from such markets, or a showing that Sylvania's adoption of such practices was not motivated by any legitimate business purposes; or a showing that the practices were initiated, not by Sylvania, but by dealers and that dealers participated in Sylvania's decisions concerning franchising of locations of other dealers; or a showing that Sylvania was a dominant manufacturer in the sale of television products in said markets and that the purpose or effect of such practice was to increase such market domination.

On the other hand, factors which would tend to [1163] support a finding that Continental had not proved an unreasonable restraint on competition would include a showing that the practice was adopted to serve legitimate business purposes, and particularly to increase Sylvania's strength as a competitor in such markets against other manufacturers of television products; a showing that Sylvania alone adopted any such locations restrictions and at all times acted unilaterally and without dealer consultation or participation with a dealer in deciding whether to franchise additional locations; and a showing that Sylvania did not have a dominant share of any of the markets involved. Further facts might be the failure of Continental to show that such practice was adopted or resulted in the driving out of competitors or resulted in a substantial foreclosure of retail outlets for television manufacturers, or a failure to show a substantially restricted number of television brands and outlets available to customers in the market or the number of television sets availablt to such customers, or a failure to show materially reduced existing competition among retail dealers in such areas, or a failure to show a resulting deterioration in quality of television products on such market or an artificially high price in such market.

No single one of the above factors is necessarily conclusive. You may properly consider all of them, to the extent justified by the evidence, in resolving the ultimate question of, assuming joint implementation under previous instructions, whether Sylvania's

locations practice unreasonably and unduly restrained competition in the free flow of commerce in the markets involved. You should understand, **[1164]** however, that in resolving this question, it is not enough for Continental to show simply a substantial restriction, if any there be, in competition solely in the sale of Sylvania television products. Rather, since Sylvania's television products were readily interchangeable with other television products in the area, you should apply the factors I have previously mentioned to the general market for television products as a whole (that is to say, all brands) in the particular areas I have mentioned to you and you should decide whether such general competition in those markets has been unreasonably restrained as a result of the challenged practices.

Given: .....

Refused: .....

Given as Modified: .....

.....

United States District Judge

[1270] SYLVANIA AND MAGUIRE'S
REQUESTED JURY INSTRUCTION No. 31C

Therefore, if you find a contract, combination or conspiracy to establish or enforce sales distribution restrictions on locations at which Continental and/or other dealers may sell products, you must further resolve the question of whether such contract, com-

bination or conspiracy, if any, unreasonably restrained or suppressed competition or the free flow of commerce in 1964 and 1965 in the Northern California or Sacramento markets for television products. You should consider such factors as whether or not the practice eliminated or unreasonably impaired competition among Sylvania dealers, whether or not any limitation on competition among Sylvania dealers, had a substantial adverse effect on competition among retail television dealers in general or among manufacturers of television products, whether or not the practice significantly impaired or restricted the amount, variety or quality of television outlets or television products available to consumers in these markets. You should also consider any benefits to competition which may result from the challenged practice, and also whether or not the practice was adopted as a reasonable means of achieving any legitimate business purposes. In this connection you should understand that if, in view of all the circumstances, it is found that a practice unreasonably restrains competition in the market place, such a practice would be unlawful even if there were good business reasons to adopt it. However, the presence or absence of legitimate business purposes is one of the factors you should consider, along with all other relevant factors, in determining whether the practice does constitute an **[1271]** unreasonable restraint on competition.

No single one of the above factors is necessarily conclusive. You may properly consider all of them, to the extent justified by the evidence, in resolving the

ultimate question of, assuming joint implementation under previous instructions, whether Sylvania's locations practice unreasonably and unduly restrained competition in the free flow of commerce in the markets involved.

Given: .....

Refused: .....

Given as Modified: .....

.....

United States District Judge

See *Boro Hall Corp. v. General Motors Corp.*, 124 F.2d 822 (2nd Cir. 1942); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F.Supp. 899 (D. Maryland), *aff'd. per curiam*, 239 F.2d 176 (4th Cir. 1956); *Top-All Varieties, Inc. v. Hallmark Cards, Inc.*, 5 CCH 1969 Trade Cases ¶72,850 (S.D.N.Y. 1969); *Potter's Photographic Applications Co., Inc. v. Ealing Corp.*, 292 F.Supp. 92, 103-05 (E.D.N.Y. 1968); *L.S. Good & Co. v. H. Daroff & Sons, Inc.*, 279 F.Supp. 925 (D.W.Va. 1968); *Peerless Dental Supply Co. Inc. v. Weber Dental Manufacturing Co.*, 283 F.Supp. 288 (E.D.Pa. 1968).

[1272] SYLVANIA AND MAGUIRE'S
REQUESTED JURY INSTRUCTION No. 31D

You should understand that in resolving the question of whether (assuming there is a contract, combination or conspiracy) Sylvania's locations practice unreasonably restrained competition, it is not enough

for Continental to show simply a substantial restriction, if any there be, on competition solely in the sale of Sylvania television products. Rather, since Sylvania's television products were readily interchangeable with other television products in the area, you should apply the factors I have previously mentioned to the general market for television products as a whole (that is to say, all brands) in the particular areas I have mentioned to you, and you should decide whether in 1964 and 1965 such general competition in those markets was unreasonably restrained as a result of the challenged practices.

Given: .....

Refused: .....

Given as Modified: .....

.....

United States District Judge

Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957); *Top-All Varieties, Inc. v. Hallmark Cards, Inc.*, 5 CCH 1969 Trade Cases ¶72,850 (S.D.N.Y. 1969); *Beckman v. Walter Kidde & Co., Inc.*, 1970 CCH Trade Cases ¶73,347 (E.D.N.Y. September 22, 1970)

[1299] SYLVANIA AND MAGUIRE'S
REQUESTED JURY INSTRUCTION No. 61

Note. This instruction is tendered for use only if the Court decides to instruct the jury on the theory that a restriction on the locations at which merchandise may be sold falls within the rule

of *per se* illegality enunciated in *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) and is not governed by the "rule of reason."

If you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy to establish or enforce sales distribution restrictions which prevented dealers from selling merchandise, owned by them, at any store or location in which they chose to sell it, unless you find that such practice was justified under the instructions I am about to give you, you must find that Sylvania violated §1 of the Sherman Act.

However, you should understand that under the antitrust laws it is lawful for a manufacturer, in franchising a particular dealer or dealers to be retail dealers in the manufacturer's products, to designate the location or locations of the place or places of business for which said dealer or dealers are franchised. It is also lawful for the manufacturer to decline or refuse to grant a dealer's request for a franchise at different or additional locations. Therefore, in order to find that Sylvania has violated the antitrust laws it is not enough to find a contract, combination or conspiracy under which Sylvania restricted the locations at which dealers were franchised to act and hold themselves out as authorized dealers in Sylvania products. In order to find for Continental, you must find that Sylvania engaged in a contract, combination or conspiracy to establish or enforce sales distribution restrictions which **[1300]** prevented dealers from moving merchandise, owned by them, to

non-franchised locations, or from selling such merchandise at non-franchised locations.

If you find such a contract, combination or conspiracy to restrain movement or sale of merchandise, such a practice would be presumptively unlawful. However, before you can find it to be a violation of the antitrust laws, you must consider whether it was justified. In this case, such a restriction would be justified if Sylvania has proved by a preponderance of the evidence that the adoption of such a restriction was reasonably necessary to enable Sylvania to remain in the television business or to enable it to increase the strength and effectiveness of its competitive efforts in the television industry. If you find that such justification has been shown, you should find that Sylvania and Maguire have not violated the antitrust laws. If you find that Sylvania has not proved such a justification by a preponderance of the evidence, and if you find the existence of a contract, combination or conspiracy to restrict movement or sale of merchandise, as I have defined it above, then you should find that Sylvania has violated the antitrust laws.

Given: .....

Refused: .....

Given as Modified: .....

.....

United States District Judge

U.S. v. Arnold, Schwinn & Co., 388 U.S. 365 .....(1967)

[1301] Federal Trade Commission Staff Report on Franchising, at 30 (December, 1969) (See discussion in Sylvania and Maguire's Memorandum at pages 16-17);

U.S. v. Arnold Schwinn & Co., 291 F.Supp. 564, 565-66 (N.D. Ill. 1967)

DOCUMENTARY EVIDENCE

Pltfs. Ex. 3

SYLVANIA ELECTRIC PRODUCTS INC.
HOME & COMMERCIAL ELECTRONICS DIVISION

This Agreement made the 19 day of March, 1964 between Sylvania Electric Products Inc., Home & Commercial Electronics Division, 700 Ellicott Street, Batavia, New York, a corporation organized and existing under the laws of the State of Delaware (hereinafter referred to as "Sylvania"), and Continental TV, Inc. (Hereinafter referred to as "Dealer"),

WITNESSETH:

In consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. Sylvania is pleased to appoint Dealer as an authorized Sylvania dealer of television receivers, stereo high fidelity reproducers and radios bearing the trademark "Sylvania" offered for sale by Sylvania from time to time during the term hereof and intended for home entertainment uses (hereinafter "merchandise").

2. Sylvania will endeavor at all times to:

(a) provide the finest merchandise which will offer dealer a fair profit opportunity;

(b) present strong and energetic merchandising programs;

(c) provide franchised Dealers maximum sales potential.

3. Dealer agrees to maintain an adequate stock and representative display of merchandise. Dealer further agrees to maintain an adequate inventory of merchandise and to promote vigorously and effectively the sale of merchandise.

4. Dealer agrees to maintain and render at Dealer's expense proper installation and service on merchandise in accordance with the installation standards and service policies established by Sylvania from time to time.

5. Dealer agrees to abide by advertising and promotional policies as from time to time established by Sylvania.

6. Sylvania shall not be liable for failure to ship any merchandise in any accepted order becaus of reasons beyond its control including but not limited to strikes, differences with workmen, accidents, fires, shutdown of its manufacturing plants or plants supplying it, governmental orders, riots, floods, acts of God, embargoes, inability to secure transportation facilities or contingencies arising out of or due to national defense activities, war or emergency conditions.

Delivery of part of an order does not obligate Sylvania to make further deliveries, and Sylvania

reserves the right to reject any order in whole or in part. Sylvania also reserves the right to allocate its inventories and current production in any way deemed by it to be desirable.

7. Dealer agrees to mail and render to Sylvania on and in accord with forms and instructions provided by Sylvania, all such reports, periodical or otherwise, of stocks, sales, and such other pertinent information relative to Dealer's inventory of merchandise purchased from Sylvania as Sylvania may from time to time request.

8. Dealer agrees to use trademarks or trade names of Sylvania in advertisements, letterheads, or otherwise only as may be approved by Sylvania from time to time in writing, but Dealer shall acquire no rights under this agreement in any such trademarks or trade names, and Dealer, upon termination of this agreement further agrees simultaneously therewith to discontinue all uses of such trademarks and trade names.

Dealer, for the duration of this agreement and thereafter will do nothing that will in any way infringe, impeach or lessen the value of the patents, trademarks or trade names under which any of such merchandise is sold, or do anything that will tend to prejudice the reputation or sale of any such merchandise.

9. During the term hereof the relationship between Sylvania and Dealer is solely that of vendor and vendee; the Dealer, its agents and employees shall, under no circumstances be deemed agents or representatives of Sylvania for any purpose whatsoever and Dealer shall have no right to enter into any contracts or commitments in the name of, or on behalf of, Sylvania, or bind Sylvania in any respect whatsoever.

10. This agreement is executed in and shall be interpreted according to the laws of the State of New York.

11. This agreement contains the full agreement between the parties, and Dealer and Sylvania declare and agree that there are no other terms or conditions, representations or understandings except those set forth in this agreement.

12. Terms of sale are net thirty (30) days.

The Dealer agrees to mail to Sylvania's Credit Department, financial statements and information from time to time as required by the latter. Sylvania reserves the right at all times, either generally or with respect to any specific order by the Dealer, to vary, change or limit the amount or duration of credit to be allowed the Dealer.

13. This agreement shall continue in force from the date hereof until terminated for any reason whatsoever by either party hereto upon ten (10) days written notice to the other. In the event of cancellation of this agreement, Sylvania is hereby granted the option to repurchase any unsold merchandise in Dealer's inventory at Dealer's invoice price.

14. With respect to all merchandise purchased by the Dealer from Sylvania hereunder, the Dealer agrees that, upon the release thereof, it will deliver

therewith such printed warranties or guarantees with respect to such merchandise as shall be furnished by Sylvania to the Dealer for that purpose. The Dealer further agrees that Sylvania's obligations to the Dealer with respect to all merchandise purchased by the Dealer from Sylvania hereunder shall be as set forth in the aforesaid printed warranties or guarantees furnished by Sylvania and that the Dealer will not purport to obligate Sylvania by issuing any other warranties or guarantees with respect to such merchandise.

In Witness Whereof these presents have been executed as of the day and year first above written.

SYLVANIA ELECTRIC PRODUCTS INC.
HOME & COMMERCIAL ELECTRONICS DIVISION
By: R. J. Theis
CONTINENTAL TV, INC.
By: Geo. N. Shahood

Deft. Exhibit C

DISTRICT SECTION I

TIPS ON SEEKING NEW ACCOUNTS IN S.L.D. MARKETS

1. . . . . Determine the size of each prospective account in the market.

2. . . . . Rate each Dealer on the basis listed below.

Basis: TV Units—Annual Total Store Sales:

Classification	TV Units Annual Rate	TV Units Weekly Rate	Annual TV $ ($133 Avg.)	Avg. Units Per Class
C	0- 25	(0)-1*EOW	$ 0/$ 3,325	15
B	26-129	(1) EOW-2.4 wk	$ 3,458/$17,157	65
A	130-389	2.5 wk-7.4 wk	$17,290/$51,737	195
AA	390 & Over	7.5 wk-	$51,870/	650

*EOW—(Every Other Week)

The types of accounts we want for our District Program are: Types "AA" and "A".

To determine the potential of the account, ask these two questions:

1. . . . . How many TV do you sell a year?

or

2. . . . . How many TV do you average per week?

From either of the two answers, arrive at your classification (per above).

Note: In some cases, Type "B" accounts may be added to our SLD Program—but, primary emphasis should be directed to "AA" and "A".

We Must Get a Minimum of Three (3) Sets per Week From Each Account!

What happens to the total territory, based on this minimum of three (3) TV units per week per account?

1 . . . . . Establish a base of 30 dealers—"AA" and "A" types, as quickly as possible.

2 . . . . . Three (3) units per week of 150 units per year—gives you a TV volume in your territory of:
$133 (Avg. Dealer Cost) × 150 units = $20,000 a yr. × 30 dealers = $600,000.

3 . . . . . Obviously, Stereo/Radio business is in addition to this or—if necessary—it will make up some part of the $20,000 per account minimum goal.

To reduce the total job per dealer into a plan of action—the target should be as follows: (Approximate numbers used).

1 . . . . . January Display Program: 30 units
(This leaves two 14-set orders prior to June) = 58

2 . . . . . June Display Program: 45 units.
(This leaves three 14-set orders prior to January) = 87
Total TV Units Per Year: = 145

Note: Keep in mind—It is important to groove the account into buying 14-units at a time. You should call on the Sylvania dealer no less than every 4/5 weeks. He MUST be encouraged to maintain his minimum selling rate of 3-units per week. IF he is a "believer"—a 14-set order

will be ready no later than every 5-weeks. IF NOT—determine the problem and take correction action!

How Much "Elbow Room" Is There, Really, In Our Program . . . . ?

Use the following industry statistics as evidence of our limited number of dealer-approach. NOTE: We give SUPER "elbow room"—while "elbow room" is adequate to make the program a success.

Deft. Exhibit F

SALES SECTION II

SLD PROGRAM

1A—The Franchise—Sylvania Home Entertainment Products are only sold through franchised dealers, properly trained and well equipped to sell the merchandise.

The franchise is not a meaningless paper that puts the dealer in a profit squeeze with weak competitors. The franchise is based on stability of direct factory relationship, with a strong straight forward program of policy and understanding. The franchise contains a good profitable selling climate by creating "elbow room" in a sensible territory based on market and dealer potential. "Same brand" competition is eliminated.

2A—The Pricing—The Sylvania Home Entertainment Product is realistically priced to the franchised dealer and, consequently, can be sold competitively and profitably in the market place.

The Product is priced to include freight and the quantity prices are available to all franchised dealers, regardless of size or market geography. The savings and efficiency, made possible by the SLD Program, are evidenced by any price comparison with any other Product of comparable quality.

3A—Financing—Sylvania offers the dealer the finest method of financing in this industry . . . . . The J. P. Maguire Plan (See Management Section—Check List Number 19). This plan offers the easiest financial method of maintaining a representative display of the Sylvania Product—A tremendous plus factor in our program.

B. *Straight Line Distribution (S.L.D.)*

Straight Line Distribution is Sylvania's concept of the proper way to distribute and market products in the metropolitan markets. It incorporates the best thinking . . . most up-to-date ideas . . . finest communications—between factory and dealer yet devised. *It Is The Industries Finest Factory Direct Program.*

S.L.D. is designed for the present and for the future. It gives Sylvania better control of its distribution, reduces distribution costs and gets the Sylvania merchandise to the dealer and the ultimate consumer—at the most competitive prices.

Profit opportunity is a *Prime* factor in the mind of the dealer today. S.L.D. guarantees the dealer that he always buys right from Sylvania—because the price is the same *Everywhere in America.* Our price sheets

are printed at our headquarters in Batavia. Dealers can be sure that they are buying "right" from Sylvania—365-days a year.

S.L.D. also eliminates "same brand competition". Sylvania wants fewer dealers and—quality rather than quantity. By not over-franchising, Straight Line Distribution eliminates vicious price cutting and establishes suggested "go" prices that enables each dealer to make a fair profit and each consumer to receive an outstanding value.

"Elbow room" gives every Sylvania dealer a geographic area in which to sell our Sylvania products. S.L.D. does not promiscuously franchise dealers without first studying their size, location and effect on the market (as well as other Sylvania dealers in the area). By franchising dealers by territory—Sylvania becomes an important profit factor to its dealers. This creates good relationship and proper respect—between factory and dealer.

Six modern, major product distribution centers serve the needs of our customers. These centers contain a complete mix of strategically located inventories of all Sylvania Home Electronics products. All Television and Hi-Fi sets are shipped to the dealer—freight prepaid.

Proper communication is a vital part of our S.L.D. Program. Each of our six modern distribution centers is connected by a direct line with our factory in Batavia and the central billing system in Camillus, New York.

There is a credit manager and an order/billing manager at each of these distribution centers to handle the needs of our Sylvania customers. In addition, each District Sales Manager lives in the heart of the territory he covers and can easily be reached by all Sylvania S.L.D. dealers.

Deft. Exhibit BV

YLA045- CTV CLA 9/8/65

T RIVERS

PLS ADV CURRENT SITUATION REGARDING CONTINENTAL TV AND REQUEST FOR FRANCHISE (SACRAMENTO) I HAVE HELD LAST ORDER PENDING HEARING FROM YOU

K LOPOLITO LOSA

TESTIMONY OF THE WITNESSES
(Citations Are To Reporter's Transcript (RT))

Testimony of Lee French

[15] * * * Mr. Miller: Q. Okay, now, Mr. French, as you have indicated, the S.L.D. program is indeed set forth in the manual. It is marked in Exhibit F, Your Honor. Let me show you that, Mr. French.

Now excerpt of it is entitled "S.L.D. program," and it says in substance this:

"The franchise—Sylvania Home Entertainment Products are only sold through franchised dealers."

"The franchise is not a meaningless paper that puts the dealer in a profit squeeze with weak competitors."

It goes on to say: "The franchise contains a good profitable selling climate by creating 'Elbow room' in a sensible territory based on market and dealer potential. 'Same brand' competition is eliminated."

It goes on to say in the fourth paragraph: "The savings and efficiency, made possible by the S.L.D. program, **[16]** are evidenced by any price comparison with any other product of comparable quality."

It goes on to say in the fifth paragraph: "Financing —Sylvania offers the dealer the finest method of financing in this industry. . . . The J. P. Maguire plan (see management section—check list number 19). This plan offers the easiest financial method of maintaining a representative display of the Sylvania product—a tremendous plus factor in our program."

Now, continuing, Mr. French, on the next page, this policy statement says:

"Straight line distribution (S.L.D.)

"Straight line distribution is Sylvania's concept of the proper way to distribute and market products in the metropolitan markets."

It goes on to say in Paragraph 2, sir: "It gives Sylvania better control of its distribution."

And it goes on in Paragraph 4: "S.L.D. also eliminates 'same brand competition.' Sylvania wants fewer dealers and—quality rather than quantity. By not over-franchising, Straight Line Distribution eliminates vicious price cutting and establishes suggested 'go' prices that enables each dealer to make a fair profit and each consumer to receive an outstanding value."

And Paragraph 5 says, "Elbow room" gives every **[17]** Sylvania dealer a geographic area in which to sell our Sylvania products. S.L.D. does not promis-

cuously franchise dealers without first studying their size, location and effect on the market (as well as other Sylvania dealers in the area).

"By franchising dealers by territory—Sylvania becomes an important profit factor to its dealers."

Mr. French, then we go down to Paragraph 7——

Mr. Popofsky: Maybe you would read the last sentence.

Mr. Miller: "This creates good relationship and proper respect—between factory and dealer."

Now, Mr. French, this statement of policy was contained in the manual of 1963, was it not?

A. I believe it was, yes.

[Continued on next page; nothing omitted.]

[18] Mr. Miller: I offer this as our next exhibit in order, Your Honor.

* * *

[19] * * * The Clerk: This is marked Defendant's F. Would you like this to be introduced as Defendant's F?

Mr. Miller: Just F. It will be Continental's F.

Mr. Popofsky: We have a problem with plaintiff, defendants, cross-claimants and cross-defendants and all that.

The Court: I understood we were going to designate you as claimants.

(Claimant's Exhibit F marked and received into evidence.)

Mr. Miller: Q. I have handed you a document which has been premarked as Exhibit C, and turning to the second page, at the bottom, the policy statement says: "How much elbow room is there really in our program? Using the following industry statistics, evidence of our limited dealer approach, note, we give super elbow room while elbow room is adequate to make success."

Was that policy statement contained in the manual in 1963, sir?

A. I don't remember it exactly. I would assume that it is if the page is from the manual.

Q. Thank you, sir. And the manual is in loose-leaf form or was, was it not?

[20] A. I believe it was.

Q. And it was supplemented from time to time with further policy statements and procedures—check list and so on, was it not? A. Yes.

Mr. Miller: We would offer claimant's C next in order, Your Honor.

Mr. Popofsky: No objection subject to the cleaning up process.

The Court: It's understood it will be cleaned up.

(Claimant's Exhibit C marked and received in evidence.)

Mr. Miller: Q. Now, Mr. French, when you got to the West Coast and became the District Sales Manager for this area, you went about franchising dealers under the SLD program, did you not, sir? A. Yes, sir.

Q. And basically, you followed the instructions in the manual? That is to say, you contacted a proposed franchisee, you told him about the SLD program, is that correct? A. Yes, in my own words.

Q. Yes. And you pretty much followed the substance of what the manual contained regarding the SLD program, isn't that right?

[21] A. In essence—I believe you could say that.

Q. Okay. Now, this elbow room policy was not part of the old distribution plan, was it, sir? A. What old distribution plan?

Q. The old distributorship—factory and the independent distributors? A. In what way—oh, there's a lot of different things. There's a lot of differences in this type of distribution than there is in the factory—factory branch distribution. Yes, there's a lot of differences.

Q. Let me put it this way. Do you have any personal knowledge as to the manner in which the territories to which you were assigned were created by the national sales department? A. I was not present when they were drawn up. I don't know exactly how they were designated or in what manner each territory was drawn up on.

Q. Well, what I'm getting at, Mr. French, is it not a fact, sir, the elbow room policy came into existing and was introduced as part of the new SLD approach that Mr. Theis and Mr. Morgan installed in 1962? A. Yes.

Q. Now, under this SLD elbow policy, each district sales manager, such as yourself, had pretty much complete discretion and control, sir, as to whom you would franchise [22] as a Sylvania dealer, isn't that so? A. Yes.

Q. Now, in other words, you also had this kind of complete control over the location, the dealer location, isn't that right, that you wished to have? A. Yes.

* * *

[23] * * * Q. Mr. French, I believe you mentioned when you got to the West Coast here in 1963 that you set about to franchise dealers, is that correct? A. That's true.

Q. And for the first time, at least in your memory, you used a written franchise agreement, correct, sir? A. Yes, sir.

Q. Now, it is a fact, is it not, that a franchise agreement did not contain a location clause? A. It did not contain a location clause.

Q. But you did verbally speak to each dealer you franchised about location, did you not? A. Yes, sir.

Q. And as a matter of fact, each dealer was verbally notified at the time he was franchised as to exactly and precisely which location was being franchised, isn't that right? A. Yes, sir.

* * *

[24] * * * Q. Let me restate the question for you, Mr. French. A. All right.

Q. As you franchised these dealers in 1963, sir, you verbally notified them precisely which of their locations was being franchised by Sylvania, is that right? A. By me?

Q. By you. A. Yes.

I am franchising them, and I am the one who had control of my territory subject to the approval of my

peers. Yes, I am the one who was saying, "Well, this is the location that I am franchising."

Q. And you didn't put that in writing? A. No.

Q. You didn't do that did you? A. No, it's a verbal agreement.

Q. Verbal agreement with each particular dealer at [25] the time you franchised them, correct? A. This is true.

Q. And that practice continued from 1963 on through at least 1965, didn't it? A. Yes.

Q. Now, any given dealer that you franchised in 1963, you verbally told him, "Mr. X, I'm franchising this location, and this location only."

If that dealer subsequently, Mr. French, in 1964 opened another store, branch store, what was your practice? A. I asked him to let me know where it was, and possibly we could negotiate a franchise for it, or that I would be willing to talk to him about it. I believe this is the answer you want.

* * *

[26] Q. Let me put it this way, Mr. French. Under the example I have just given you where the dealer who you verbally franchised first—he has a main store—has a branch store subsequently—— A. Right.

Q. ——it is necessary for him to seek approval from you before he can be considered a franchised Sylvania dealer at his branch store, isn't that right? A. Right.

Q. And it is against Sylvania policy for that dealer to move merchandise into that branch store and sell it

before he gets approval for a franchise from you, isn't that right? A. Against Sylvania's policy?

Q. Yes, sir. A. I can't say definitely that it is against Sylvania's policy. It's against my policy.

I wouldn't want it to maintain a decent relationship with the dealer.

Q. You wouldn't do it any other way? A. Right.

Q. As a matter of fact, that was your policy in 1963, was it not? A. Right.

Q. Okay. And that continued to be your policy in [27] 1964 and and 1965—— A. Right.

Q. ——in your territory? A. Right.

Q. Is that right? A. Right.

Q. And when you would franchise the branch store, you would do so verbally, would you not? A. That is right.

Q. And—— A. To the dealer.

Q. Excuse me? A. To the dealer.

Q. To the dealer owning the store? A. Yes.

* * *

[30] * * * Q. Is it a fair statement to say if you told us under oath in your deposition that you had five or less dealers in Santa Clara County in 1963 that that would be a better recollection than you would have presently? A. Absolutely.

Q. Thank you.

How about Alameda County?

Can you estimate for us how many dealers you had there in 1963? A. There were five there approximately.

Q. How about Contra Costa County? That was your territory? A. Yes.

Q. How many dealers there in 1963? A. Maybe four.

[31] Q. And how about San Mateo?

How about San Mateo County? A. Five possibly —maybe six.

Q. All right. You said in 1966 under oath in your deposition you had two dealers in San Mateo County. Does that refresh your recollection? A. If that is—okay.

Q. How would you describe Sylvania's market share in your territory in 1963? A. Somewhere around five percent—maybe less.

Q. Overall? A. One percent possibly.

Q. Now, in your deposition in 1966, under oath you testified that Santa Clara market penetration was about three to five percent; San Mateo and Alameda being about half that. Would that refresh you at the present time? A. Yes.

Q. Does that seem accurate to you? A. I have an idea in my memory it was a little better than it is now.

Q. You didn't have a dealer in Salinas in 1963, did you? A. No.

* * *

[36] Q. All right, when was it that you would say there was substantial increase in the color demand in the territory? A. Probably in the fall of '64, probably.

Q. During 1964 at some point? A. I believe so.

Q. And that continued to 1965, did not it? A. Yes.

Q. And that demand increased in 1965, did it not, sir? A. Yes.

Q. And increased steadily from January 1965 through September 1965, is that correct? A. Yes.

Q. And until about September or October of 1965, there was a tremendous, unprecedented demand for color merchandise on behalf of dealers, isn't that a fair statement? A. The matter of supply and demand was a real factor, yes. There was more of a demand than the manufacturers were able to supply at that time.

Q. When did Sylvania first have a full line, all flavors and models of color television merchandise? A. That is a pretty broad statement, really. There are some flavors they still don't make.

[37] Q. All right, let's take it by year. In 1963 you testified Sylvania did not have a very complete color line, is that fair? A. That is right.

Q. In 1964, what was the situation? A. In '64, I believe it was in June of '64 that we introduced a more complete color line.

Q. All right, sir, now you mentioned June of '64; is it not a fact that June of each year is the introduction date for the next following year's models? A. I believe so, yes.

Q. And to your knowledge that is an industry practice, is it not? A. Right.

Q. Just like car models? A. This is true.

Q. So in June of 1964, the 1965 line of television models would be introduced? A. Yes.

Q. And in June of 1965 the 1966 line of television models would be introduced? A. That is right.

Q. All right, now, you mentioned this unprecedented market that commenced in September and October of 1965. Was Sylvania caught in the manufacturing bind also? [38] A. In 1965?

Q. Yes, sir. A. Yes.

Q. Would you describe for us generally the situation that existed for Sylvania as of October 1965? A. Yes. I believe we went on dealer allocation, as far as color sets.

Q. Do you have any knowledge as to whether or not any other manufacturer went on allocation also? A. I think almost all of the manufacturers. I can't say for sure but I believe they were.

Q. And what do you mean by allocation? A. I mean that the factory was only able to produce a given number of color television sets to supply their existing franchise dealers.

Q. So that they rationed them? A. An equitable share to each dealer had to be on an allocated basis.

Q. How long did that shortage basis last, Mr. French? A. Probably a year. I don't believe it was much longer than that.

Q. About a year? A. I believe it was.

Q. And what month in 1966 would you say it was over? A. Probably during the summer.

* * *

[43] * * * Q. Okay, did you explain the Elbow Room policy to Mr. Shahood on that occasion? A. I believe that I went into the Elbow Room Policy, yes.

Q. You told him in essence you were not going to establish a dealer close to him in that market area?

A. I did not exactly say that I was not going to put a dealer in his area. I said that I was looking for a given amount of penetration in each market area. That if I was getting that, I certainly was not soliciting dealers from that given area.

Q. I would like to refer, if it please the Court and counsel, to Page 112 of Mr. French's deposition, taken on May 23, 1966, commencing Line 21.

"Mr. Miller: Q. Thereafter, did you meet him at his store or his proposed store location?

"A. Yes, I went in to San Leandro.

"Q. San Leandro is part of your territory, right?

[44] "A. Right.

"Q. And what was the substance of your discussion—" Continuing on Page 113—"at that location?"

"A. The general substance of the discussion with any dealer that I go into franchise is explain our policy and programs of merchandising. That we are a factory direct organization. That I had a large territory to cover. That I was not able to put dealers right next door to each other and I had to establish dealers in certain areas that were going to get me the volume and a good merchandise turnover and display for that particular area. That it was necessary to put in a full line display of the merchandise.

"That we feel that a dealer is entitled to a fair profit margin in merchandising Sylvania, and we liked to do business with that type of dealer."

Mr. French, does that impress you——

* * *

[46] * * * Mr. Miller: Q. Mr. French, isn't it a fact after all this harangue of counsel that you did indeed tell Mr. Shahood on that occasion that you were not about to establish a dealer right next door to him, if you franchised his store? A. That is right, and I don't believe that I denied that in my first statement.

Q. That is in keeping with the Elbow Room Policy as expressed in the Sylvania Sales Manual, is it not? A. Yes.

Q. And that is what you were told the policy of the company was, correct, sir? A. I don't follow that question, maybe I——

Q. All right, I am simply saying that what you told Mr. Shahood in San Leandro at your first meeting with him about that subject was in keeping with your understanding of the S.L.D. program, and specifically the Elbow Room Policy thereunder? A. It is my interpretation the way that I can run my business under the existing program, yes.

Q. And it was in keeping, as far as you knew, with that policy? A. I don't think it was anything contrary to the [47] program.

Q. Right, as far as you knew at that time you were operating under your company policy, were you not? A. I believe that I was.

Q. And I feel certain you continued to operate under that policy throughout 1964 and 1965? A. I hope that I was.

* * *

[56] * * * Q. Now, did you sign Continental TV up to the new written franchise like Exhibit 3 at the

time you franchised the Stevens Creek store? A. No.

Q. It was not the policy of your company to do so, was it? A. No.

Q. In other words, after the original written franchise bore a given location, each additional franchise was granted verbally, isn't that correct? A. Verbally I notified them as far as the credit department was concerned and as far as our sales office is concerned.

Q. And did that by memorandum? A. On an order. On an order. On placing an order, which was at the Stevens Creek Store. The order was placed directly to be delivered to this address.

Q. Let's suppose you have decided to franchise a given dealer. Who in the sales department must approve your decision? A. It would be my immediate supervisor.

[57] Q. In 1964-1965, Mr. Don Carroll, regional sales manager, correct? A. That's correct.

Q. And how was your request for approval communicated to Mr. Carroll in 1964—you know, in general? A. On the telephone, I believe.

Q. Verbally? A. Through telephone conversations.

Q. Generally it was not in writing, was it? A. No.

Q. What other approvals in the sales department were necessary when you decided to approve a dealer in your own territory? A. It depends on circumstances, I believe, but on this particular incident, I

just notified Don Carroll of the store and the location. Naturally it was one of the finest looking stores. I was proud to be able to have it as a franchise location. I made quite a point of it.

Q. Did Mr. Carroll have any objection to this store? A. If he did, he never mentioned any.

Q. Well, did he not say in essence, it's fine with me. We need help here? A. Well, in essence, yes. He never had any objections.

* * *

[58] * * * Mr. Miller: Q. In general, would there need to be any approval above Mr. Steiner in the sales department for—— A. No.

Q. Just a moment. A. Not to my knowledge.

[59] Q. Okay. ——for the approval of a franchise dealer within your territory?

You wouldn't have to go above Mr. Steiner, for instance? A. I wouldn't think so.

Q. As a matter of fact, you wouldn't even have to go to Mr. Steiner. Going to Mr. Carroll was generally sufficient within your own territory? A. As far as I know. I don't know that it goes any further than that.

Q. And that was true in 1964 and also in 1965, wasn't it? A. I believe so.

Q. Now, who in the credit department did you have to go to, Mr. French, where the dealer was in your territory? A. I would notify Mrs. Barnes.

Q. Mrs. Barnes down here, area credit supervisor? A. This is right.

Q. And then after she left, Mr. Lopolito—— A. Right.

Q. ——took her place? A. Yes.

Q. Would you have to go any further as far as you knew up to national credit level? A. I never went any further.

[60] Q. Did anybody in the credit department have any objection as far as you knew to the Stevens Creek franchise? A. Not to my knowledge.

Q. Doesn't Sylvania really leave the decision as to franchising a dealer in your territory entirely up to you as that territory's manager? A. Pretty much, yes.

Q. In other words, if you say, "I don't want this particular dealer to be franchised," generally Mr. Carroll, Mr. Steiner and Mr. Morgan would not overrule you, would they? A. I never tried it really.

Q. Let me rephrase it.

You have never experienced a situation where you did not want to franchise a dealer inside your territory but had Mr. Carroll and Mr. Steiner or Mr. Morgan, one of those men, reversed that decision on you—that never happened, right? A. Not to me.

Q. Never happened in all of the time you have been in your territory, has it? A. No.

Q. As a matter of fact, after you make a franchise decision, you don't hear anything from a national department—you assume there is no objection, don't you? A. Yes, sir.

[61] Q. Now, excluding Continental's case, have you ever had an objection from a national sales de-

partment where you have franchised a dealer in your territory—an objection about your decision to franchise that dealer? A. I don't remember any.

Q. Right. As a matter of fact, you haven't had any since 1963, have you, to the present time? A. I don't believe so.

* * *

[68] * * * Q. Okay. Now, after the Stevens Creek Store was franchised in Oakland, Mr. Shahood on behalf of Continental TV indicated to you that he was interested in the San Francisco market, did he not? A. I don't remember exactly the time it was mentioned. He mentioned several. I'm not sure the period this happened, San Mateo, Oakland, San Francisco—I believe somewhere along the line he was planning 10 or 12 stores, but I can't be sure of the time. If this is the time period, then I concur with it.

Q. All right. Mr. French, I'm leading up to the period of June, 1964, the Berkeley dealer show, and I would like to ask you, prior to that dealer show, had you ever been informed by anybody from Continental TV that they were interested in the San Francisco market? A. I believe this was brought up at that time, [69] yes.

Q. As a matter of fact, didn't you relay this information immediately to Mr. Carroll here? A. Yes.

Q. Right. And this was the first occasion, was it not, where Continental TV had talked about going into someone else's territory? A. Yes.

Q. And this was Mr. Carroll's territory at this time, correct? A. Yes.

Q. Because Mr. Carroll was handling the San Francisco area later covered by Mr. Hallday? A. Right.

Q. So you immediately notified Mr. Carroll of this concept or idea that Continental was talking about? A. Right.

Q. And as a matter of fact, when you did that, Mr. Carroll didn't question anything else except the location, a proposed location? He wanted to know that, didn't he? A. Well, where and when, yes.

Q. Where and when. A. Yes.

Q. Correct? A. (No response.)

[70] Q. And as a matter of fact, he told you in substance that when Continental did find a specific location for you to notify him? A. Right.

Q. Now, that's pretty normal in any case, is it not? A. Yes, sir.

Q. That is, where a dealer who is a franchise dealer for the first time requested franchise outside your territory, you have got to go to someone else for franchise approval. It's no longer within your sole discretion, is that right? A. That's true.

Q. So we have a certain territorial problem then, don't we, sales wise? A. Yes.

Q. Now, do you remember the 1964 Berkeley dealer show? A. Yes, I remember it. I will do my best to remember the thing that you want me to.

Q. Where was it held? A. At the Claremont Hotel.

Q. And in June of 1964? A. Yes.

Q. Mr. Shahood attended? [71] A. Yes.

Q. And you solicited a further order? A. Yes.

Q. And it was again a small order? A. Yes.

Q. Less than $7000? A. I believe so.

Q. And again it was on credit terms, 30, 60, 90 days? A. I believe that this is true, yes.

Q. Do you recall on that occasion attempting to talk to Mr. Shahood on behalf of Continental TV about the subject of the Maguire financing plan? A. I believe that this was made available to us at that time, yes. I mentioned it to George.

Q. You mentioned it to Mr. Shahood? A. Mr. Shahood.

Q. Now, Mr. Shadood was opposed to listening to this discussion of the Maguire financing plan, isn't that so, on that occasion? A. Yes, I was led to believe that?

Q. What led you to believe that? A. He said that he wasn't interested in the Goddamn financing plan.

[72] Q. Okay. And in fact he wouldn't even let you continue your sales pitch on the plan, would he? A. Well, this is true.

* * *

[73] Q. Okay, let me show you Exhibit G, which is a document entitled "Sylvania Dealer Inventory-Finance Plan, A New Concept In Dealer Financing." Just glance through it, Mr. French, and I will ask you two or three questions? A. Yes.

Q. Now at some point in time you have read the document, have you not? A. Yes.

Q. And it was contained in your sales manual at one time, at least, was it not? A. I believe it was.

Q. And in the first paragraph it says:

"The J. P. Maguire Floor Plan."

"The J. P. Maguire Floor Plan Program may very well have been instituted when the dealer was originally franchised. Despite this fact, a complete understanding of this plan, explained in detail in the accompanying literature, will still be important at this point. To begin with, this plan is a tremendous selling tool for you and offers a buying, inventory and 'no capital tie-up' advantage for the dealer.

"Outline it in this manner:

"1—With this plan, Sylvania finances their products in the dealer's store for four months FREE.

"2—The dealer pays as he sells—with no curtailment charges or payments prior to maturity.

[74] "3—Monthly statements are sent by J. P. Maguire to keep dealer up to date on account.

"4—At the end of a four month period, the dealer has the option of paying unpaid balance or extend financing for a 30 day period at ½ of 1 percent—this may follow on the second 30 day period.

"5—To control inventory, IBM cards are sent to cover each unit, serial number and cost. On the dealer's copy of the trust receipt schedule date of sale and the date of payment may be noted."

It continues on the second page:

"For a dealer to participate under this program, the following forms must be signed by the dealer principal. Responsibility for having these

forms signed and mailed to Area Credit Supervisor rests with the Sylvania District Sales Representative."

Now, the District Sales Representative in this case in your territory was yourself, correct? A. That is right.

Q. And then it lists several forms.

"1—The order—(Bill and ship to dealer)

"2—Signatory Authorization

"3—Dealer information form in triplicate

"4—Statement of Trust Receipt Financing in triplicate.

[75] "5—Personal Guaranty (if required)

"6—Franchise in duplicate

"7—Dealer Application in duplicate

"8—Financial and Operating Statement."

All right, now, so this plan is outlined in your sales manual as the plan that you were soliciting dealers to accept after June of 1964, isn't that so?

A. The word "soliciting" kind of throws me a little bit. I was proposing it to the dealer but as far as soliciting actually to force a dealer into it, no.

Q. You felt that it was an advantage for some dealers? A. To some dealers it would be an advantage.

* * *

The Clerk: Introduced and admitted in evidence.

[Inventory Finance Plan, marked Claimant's Exhibit G for identification was received in evidence.]

* * *

[81] * * * Q. What was the purpose of the dealer information form? A. To list the dealer himself and the location, I believe.

Q. Okay, all right. And this one is made up for Continental T.V., Incorporated, dated July 14, 1964, and it lists a corporation, Continental T.V., Incorporated, principal place of business: Stevens Creek Boulevard, and another place of business is on Santa Clara Street, and a third place of business is in San Leandro, so at this time there were three stores apparently franchised, is that correct? A. Yes.

Q. Now, was it the Sylvania policy to fill out one of these dealer forms every time a new store was franchised? **[82]** A. No, sir.

Q. It just so happened at the time that this document was prepared these stores were open and they were listed? A. That is true.

Q. As the Oakland or San Francisco store opened thereafter, they were not placed upon a sheet of this type? A. No.

* * *

Mr. Miller: Q. Now, as a matter of fact about the time that you left these documents which we just put into evidence with Mr. Shahood, you told him that the use of the Maguire would aid Continental T.V.'s expansion into a chain of stores, did you not? A. If it were approved by credit that this would be advantageous, I believe I did, yes.

Q. Right; in other words, you were just telling him simply what the fact was, isn't that right? **[83]** A. Right.

Q. And you believed it to be true? A. Providing, I—again, there is credit approval.

Q. Certainly. These questions I am asking you, you may assume that I am including in them subject to whatever credit review we find later from other witnesses is necessary.

So you did in substance tell Mr. Shahood of Continental that this would enable Continental T.V., at least enhance the possibility, increase the possibility of Continental T.V.'s expansion into this chain that Mr. Shahood was talking about to you, is that right? A. Yes, sir.

Q. Of course, at the time that you and Mr. Shahood discussed that type of an advantage connected with the Maguire Plan, Mr. Shahood still had not signed these documents, had he? A. No, sir.

Q. Of course, after the date appearing on these Maguire Plan documents, which is about the middle of July of 1964, I assume that the Maguire Plan was approved for Continental T.V., is that correct? A. To my knowledge, yes.

Q. And upon approval Continental placed its first substantial order, do you recall that? A. Yes.

[84] Q. It was a carload or more, was it not? A. I believe it was.

Q. Of course, the two previous orders were small, around six, seven thousand dollars? A. Yes.

Q. And, in fact, this merchandise was shipped to both franchise locations, there were three, there was a small store downtown but by both I mean San Leandro and Stevens Creek? A. I believe it was, yes.

Q. Okay, now, you heard more about San Francisco and Continental T.V.'s desire to operate a store

in that territory after the Maguire Plan was accepted, did you not? A. Yes.

Q. And you heard it from Mr. Shahood, did you not? A. I heard from Mr. Shahood?

Q. Yes. Sometime before the end of the year in 1964, did you not become aware of a specific location that Mr. Shahood wanted Continental to operate from in San Francisco? A. Sometimes in 1964, yes.

Q. Okay, and what did you do with that information when you heard it? A. I passed it on to Mr. Carroll.

Q. And you did so immediately, didn't you? [85] A. Yes, sir.

Q. Mr. Carroll was still your immediate superior? A. Yes, sir.

Q. I suppose he still is at the present time? A. Yes.

Q. And you told Mr. Carroll in substance that Continental had found a location on Geary Street? A. Yes, sir.

Q. This was before Continental had opened the store, right? A. Correct.

Q. What did Mr. Carroll say about this? A. I don't remember what he said. I think he wanted to look at it. It sounded all right or it sounded like a good location, or "Let's take a look at it." I can't remember.

Q. Now, at or about the time that you talked to Mr. Carroll about San Francisco for Continental, you did look at the location on Geary Street personally, didn't you? A. Yes.

Q. And you did not have any objection to Continental locating at that point or that location in San Francisco, did you? A. No.

Q. It was out of your territory? [86] A. Yes, sir.

Q. So you could have no discretion in the matter from a company policy standpoint, could you? A. No.

Q. It was in the hands of Mr. Carroll and perhaps somebody higher up? A. Yes, sir.

Q. Okay, do you recall that Mr. Carroll also looked at the location? A. Yes.

Q. Now, did Mr. Carroll ever voice any objection to you about Continental's location on Geary Street? A. Not to my knowledge.

Q. As a matter of fact, to the contrary, did he say that he needed help in San Francisco? A. I believe so.

Q. Right; in fact, previous to the time that you were told of the specific 3210 Geary Street location, Mr. Carroll had repeatedly asked you if Continental had found a location, or what was Continental doing about San Francisco; he had asked you about that previous to the location specification? A. It is possible that he asked me most any time that we had conversation if I had anything definite to report on it, yes.

[87] Q. As a matter of fact, he was quite anxious, was he not, to have Continental establish itself in San Francisco at that time, he expressed that to you? A. We are always anxious to get more dealer store locations, good dealer locations.

Q. And he expressed that to you, did he not? A. Yes, sir.

Q. Now after Mr. Carroll saw specifically the location himself, did he voice any objection to Continental's doing business there? A. No, sir.

* * *

[91] Q. I understood you to say, Mr. French, that it was your personal requirement that if it was not approved by the other territory salesman that you would not take the stocking order for the branch, is that your testimony? A. I would not take a stocking order for a branch location on someone else's territory.

Q. So simply what I am saying is, the other territory salesman's approval is necessary in such a situation such as that, to your knowledge? A. Yes.

Q. Is that correct? A. Yes.

Q. And as a matter of fact, didn't Mr. Carroll have that same policy in San Francisco in 1964? A. I believe so, right.

Q. And don't you also believe that Mr. Hines had that same policy in 1964 in his territory? A. I can believe that he has, I can't answer for Mr. Hines but I would assume that it would be that way.

Q. Was that your belief in 1964? A. I can believe that, yes.

Q. And it was your belief that these policies continued in these other territories in—from 1964 until the present time, isn't that right? A. I believe so.

[116] * * * Q. So after Mr. Carroll in this instance in San Francisco looked at the location and approved it for Continental's store, the only thing that

was necessary was for you to tell Mr. Shahood that it was an approved location, right? A. Yes.

Q. And then take an order if I needed one for that location? A. Yes.

Q. Now, as a matter of fact, a stocking order was placed and routinely sent through the credit department and shipped for the Geary Street location some time in late 1964, is that correct? A. I believe so.

* * *

[119] * * * Q. Okay. Now, the store on the east side of San Jose was on East Santa Clara Street? A. Yes.

Q. Is that correct? A. Yes, sir.

Q. And Mr. Shahood talked to you about opening that store before it was opened and carrying Sylvania merchandise? A. Yes, sir.

Q. And you had no ojection to that location? A. No, sir.

Q. And Mr. Shahood then just moved some merchandise he had in his warehouse to the east Santa Clara Street store and started to display it, didn't he? A. Yes, sir.

[120] Q. And that was with your permission? A. Yes, sir.

Q. And you didn't send any written notification to Mr. Carroll, your boss, did you, that this store was being franchised? A. No written notification, no.

Q. That's not necessary under your policy, is it? A. Not necessary to send a written notification, no.

Q. And it wasn't necessary in 1964 or 1965 to send a written notification to Mr. Carroll, was it? A. Not to my knowledge.

Q. And what you did do, however, was merely verbally tell Mr. Carroll that this location was going to be franchised on the East side of San Jose in substance, isn't that what you did? A. Yes, sir.

Q. And Mr. Carroll didn't have any objection to it, did he? A. No, sir, he didn't express any objection.

Q. Of course, this was still within your own territory, the East side of San Jose, correct? A. Yes, sir.

Q. In fact, of the four locations I pointed out to you that Continental was operating and from which Sylvania [121] was selling Sylvania merchandising in 1964, only one was outside your territory, and that was the San Francisco Geary Street store, correct? A. Yes, sir.

Q. You say Mr. Carroll visited the Geary Street store. What was his reaction to that store? A. Very favorable.

Q. Did he make any comments to you or indicate to you in any way as to what he thought of the size of the store, its decor, the way Continental was displaying merchandise, any of these things? A. He was very impressed with the store, the layout, the decor, yes.

Q. Personnel? A. I don't believe that he made any comment on personnel. That I don't recall.

Q. Was Continental displaying a full representative line of Sylvania's merchandise? A. They were representing Sylvania quite well.

Q. In the Geary Street store? A. Yes.

Q. In Stevens Creek? A. Yes.

* * *

[136] * * * Q. So by December, by the end of 1964, Continental had five facilities operating in that they had had a Mission Street store, the Stevens Creek to there east of San Jose, to the fact that they had their Earl Street warehouse, and of course, the Geary Street store, they had all those facilities and you were familiar with those facilities, were you not, sir? A. Yes sir.

Q. Now, you also knew in 1964, sir, that Continental [137] TV commonly moved merchandise between the stores itself. In other words, they would take a truck if they needed sets at the Geary Street, they would take sets as they were available from the warehouse and from the Stevens Creek store and truck them up here themselves? A. Yes sir.

Q. And so commencing sometime in the late summer of 1964 you had knowledge of the fact that Continental was doing this intrastore transfer of merchandise? A. Yes sir.

Q. And did you ever have any objection to that? A. No sir.

Q. In other words, this was merchandise that Continental had purchased from Sylvania, correct? A. Yes sir.

Q. And had paid for under the Maguire plan. A. Yes.

Q. And they were taking this merchandise and using some of it in San Francisco and if they needed to they would truck it from San Francisco down to San Jose or even to a warehouse, correct? A. It is possible. I don't know of ever taking any merchandise from a store back into the warehouse.

Q. That's right, because they were selling a very large volume to the public by the end of 1964, isn't that [138] correct? A. Yes sir.

Q. And in other words, the orders that were being shipped by rail, as they came in they were processed through Continental's warehouse, sent out to Continental stores and sold, isn't that what was happening? A. That was the usual procedure.

Q. Right. Now, it was common and is common and still is common for dealers with branch stores to move merchandise back and forth? A. Yes.

Q. And Sylvania has no policy which restricts a dealer in such conduct? A. Not to my knowledge.

Q. You have no personal policy to so restrict a dealer? A. No sir.

Q. But it was necessary for each of those locations where merchandise was moved by the dealer to be franchised, isn't that right? A. As far as I am concerned, yes sir.

Q. That's right. In other words, if dealer X had two locations and you had franchised, let's say, his location in Hayward but you had not franchised his location, let's say, in Berkeley, and he moved sets from Hayward to Berkeley to the [139] non-franchised outlet, that would be against your policy, would it not? A. Against my procedures.

Q. Yes. Against company procedures correct? A. I—I absolutely am not sure on that part of the policy. I believe it is necessary to have a franchise in each location.

Q. Well, Mr. French, the company in 1964 and 1965, the Sylvania company, did not offer chain franchising? A. No.

Q. That is a true statement? A. This is right.

Q. And chain franchising means what, sir? A. To my knowledge, it means franchising one buying office that can ship all over the United States to any store location they want, I guess.

Q. That's right. In other words, chain franchising means that once you make a franchise with a man he could open branches anywhere and you would have no control over it? A. That's basic, yes.

Q. And that's not what Sylvania policy was in '64 and '65? A. That was not their policy, yes.

Q. Not allowed by Sylvania, correct? A. As far as I know we were dealing with individuals.

[148] * * * Q. Now, Mr. French, by the end of 1964 would you say **[149]** it is a fair statement that Continental became or was at that time an important dealer to Sylvania? A. It was very important to me.

Q. How about your company? A. I believe that it could be considered as important to the company also.

Q. Had you ever had a dealer either in New York or since you have been out here in California whose credit line had gone from $15,000 to $300,000 in nine months? A. No, sir.

Q. In your opinion, sir, in 1964 did Continental's efforts increase Sylvania's penetration in Northern California? A. Yes.

Q. As a matter of fact, what portion of your total purchases in your total territory did Continental account for in 1964, would you say? A. Possibly pretty close to 50 percent.

Q. As you say, all orders were at least carload after Maguire's plan was accepted? A. Yes.

Q. Now, was the color TV market becoming important in your business in 1964 compared to what it had been in 1963? A. The latter part of 1964 I believe it was becoming an important factor.

* * *

[165] * * * Q. Now, you have already covered for me Sylvania's policy against chain franchising. Now, in 1965, it is a fact, is it not, that Continental T.V. opened additional branch stores? You're aware of that? A. Yes.

Q. In fact, they opened a store in Oakland, did they not? A. Yes.

Q. They opened a larger and more spacious store in San Jose, a warehouse in San Jose, didn't they? A. Yes.

Q. They opened a store in Salinas? A. Yes.

Q. They even opened a store in Seaside, California? A. Yes.

Q. They opened the store up that used to be the rain store—they reopened 177 West Santa Clara Street in San Jose? A. Yes.

Q. You were certainly aware of all these openings, were you not? **[166]** A. Yes.

Q. Let's take the Oakland store first. That was opened in about March of 1965? A. I believe so.

Q. All right, sir.

And since Sylvania does not franchise chains, it was necessary for Mr. Shahood on behalf of Continental T.V. to seek Sylvania approval for that location

before he could merchandise Sylvania from it, right? A. Yes, sir.

Q. And since that location in Oakland was not within your territory, you weren't authorized to franchise it for him, were you? A. That's right.

Q. So he would have to talk to either Mr. Hallday whose area it was or to Mr. Carroll who supervised the territories in general, correct? A. Right.

Q. And as a matter of fact, after you learned about the location proposed by Continental in Oakland, did you discuss it with Mr. Carroll? A. Yes, sir.

Q. And did Mr. Carroll have any concern with the location of other Sylvania dealers around the area? A. He didn't express any to me.

[167] Q. He only wanted to know one thing, and that was, where was that store going to be located? A. Yes, sir.

Q. He didn't ask you about anything else, did he? A. No.

Q. And you told Mr. Shahood after talking to Mr. Carroll—strike that. Mr. Carroll didn't have any objection either, did he? A. He didn't express any objection.

Q. Do you understand, or did you understand at that time that Mr. Carroll had approved that location for Continental in Oakland? A. That was my understanding.

* * *

[170] * * * Q. All right. Mr. French, we have talked for about a day now about franchisers. What

did it mean to the dealer after you told him that he was franchised as a Sylvania dealer? What did that mean to him? A. That he was franchised as a Sylvania dealer. It meant basically that he could sell Sylvania products from that location.

[171] * * * Q. I will withdraw the question. Is it not a fact, Mr. French, that other than entitling the dealer to sell your product from that location, the franchise doesn't mean one other thing to him? A. As far as I know.

Q. As far as you know, that is correct, is it not? A. That is correct.

* * *

[182] * * * Q. All right, sir. Let me put it this way: In 1964 did your company grant exclusive franchises as a policy? A. No sir.

Q. And they did not in 1965 either, did they? A. Not to my knowledge.

Q. And to your knowledge that was their policy in your territory, in Mr. Hines' territory, Mr. Hallday's territory, as far as you know and all the rest of the territories? A. As far as I know there was no policy against—for or against exclusive franchises. I know of no policy.

Q. It was not a policy of your company to grant them? A. Yes. No, I don't know. There is no policy as far as exclusive franchising.

Q. You say there was no policy. Do you mean there was no policy one way or the other; that sometimes you granted them and sometimes you did not? A. I don't know of any policies that were granted.

I don't know of anyone that was refused one. I don't know of any such instances.

Q. Let's talk about that a minute, Mr. French. Since January of 1963 did you ever tell a dealer he had an exclusive franchise in any given territory? **[183]** A. No sir.

Q. To your knowledge has Mr. Hines ever told anyone that he had an exclusive franchise in his territory? A. Not to my knowledge.

Q. Has Mr. Hallday ever told that to any dealer, to your knowledge? A. Not to my knowledge.

Q. And has Mr. Carroll ever granted, as your immediate superior, an exclusive franchise to any dealer in any territory that you knew about? A. Not that I know of.

Q. What do you mean by an exclusive franchise as we have been using the term? A. As an exclusive franchise I am guessing it would be that there would be no other dealer ever solicited in that area, that you have an exclusive franchise to sell a product.

Q. In other words, that you would promise that dealer not to put on another dealer in that territory, would that be correct as a definition of exclusive franchise? A. As a broad statement I would say yes.

Q. That is what we are talking about, is it not? A. Yes.

* * *

[236] * * * Q. Now, did you solicit further orders from Continental T.V. after that last telephone conversation? A. Yes, sir.

Q. As a matter of fact, you were having—I say you—**[237]** Sylvania was having a local San Francisco show of their 1966 line about that time? A. Yes.

Q. What was the purpose of the local show? A. To introduce the new line of merchandise to the local dealers that were unable to attend the Chicago convention.

Q. The dealers were not invited to the Chicago convention? A. Yes.

Q. And at or near the time of that show, you solicited a $50,000 order from Mr. Shahood by phone? A. I believe it was in that neighborhood.

Q. And later you contended to review that same order with him in San Jose? A. Yes.

Q. And it was finally raised to about $63,000, $64,000, correct? A. I believe so.

Q. All right, sir. Let me show you Exhibit P and ask you if you recognize that document. A. Yes.

Q. Now, at or near the time—strike that.

This Exhibit P is what, sir? Is that the July order **[238]** that Mr. Shahood gave you on behalf of Continental? A. Yes, sir. It is dated July 20, I believe.

Q. And that's a dollar amount shown on it, is it not, $63,658.91? A. Yes.

Q. Is that the order you solicited and finally got from Continental T.V. in late June or early July? A. Yes, sir.

Mr. Miller: We would offer this as Claimant's next.

Mr. Popofsky: No objection.

The Court: Admitted.

The Clerk: Claimant's P admitted in evidence.

[Document above referred to was marked Claimant's Exhibit P for identification.]

* * *

[242] Did you solicit any orders after the July order? A. I believe I did, yes.

Q. I show you a document marked as Exhibit R. Please read that over to yourself. A. Yes, sir.

Q. What is the date on that order? A. August 27.

Q. And that was really written up in the form of two orders, was it not? A. Yes.

Q. And one order was for immediate shipment? A. Yes.

Q. And one was to be shipped after October, October 10th? A. Yes.

Q. Did you take this order? A. Yes, sir.

Q. Mr. Shahood signed this as you did the previous July order? A. Yes, sir.

Mr. Miller: I offer this, Your Honor, as Claimant's next in order.

Mr. Popofsky: No objection.

The Court: Admitted.

The Clerk: Exhibit R introduced and admitted in **[243]** evidence.

[Shipment orders, marked Claimant's Exhibit R for identification was received in evidence.]

Mr. Miller: Q. All right.

So this Exhibit R, this August 27 order, was for about $112,000, merchandise to be split-shipped, correct? A. Yes.

Q. So we had a July 3rd order for $63,000 and now we have the August 27th order for $112,000 to be split-shipped or about $175,500 worth of Sylvania merchandise which Continental ordered after the June convention, correct? A. Yes, sir.

Q. All right.

Now, did—the July order, Exhibit P, was that routinely processed? A. To the best of my knowledge.

Q. To the best of your personal knowledge? A. Yes.

Q. And did you send it to Mr. Lopolito of the—the credit man in Los Angeles? A. I believe I did.

Q. And to your knowledge was it processed routinely there and sent on for filling at the factory? A. I believe so.

[248] * * * Q. Now, Mr. French, when did you first become aware that Continental was proposing a Sacramento location? A. It had been mentioned—I am not exactly sure when.

Q. All right, sir.

I refer you to page 406 of your deposition, starting **[249]** at line 15.

"Q. Now, Mr. French, when did Mr. Shahood first tell you that he planned to open a Sacramento store?

"A. That was before we went back to Chicago.

"Q. Would it be before June?

"A. It was before June.

"Q. Can you recall from the month when you were first told that he planned to open a Sacramento store?

"A. I believe it was in—I can't say for sure—sometime in March, I believe, somewhere in that area."

Mr. Miller: Q. Would that refresh you, sir, to some extent as to when you first learned of it; sometime in March or spring of 1965? A. Yes.

Q. When did you first hear about a proposed Sacramento location for Continental T.V.?

Did Mr. Shahood tell you that he was proposing to sell Sylvania products there? A. No, sir.

Q. What products did he talk about handling at that time? A. Philco, primarily.

[250] Q. Also Motorola? A. Motorola.

Q. What did you do with this information in March of 1965? A. I believe I informed Mr. Carroll.

Q. That's right.

You relayed this information to Mr. Carroll, regional sales manager, pretty much immediately, didn't you? A. I believe so.

Q. Okay. And as a matter of fact, didn't you tell Mr. Shahood on that occasion that that was all well and good in substance, but that if he had planned to sell Sylvania in Sacramento that he certainly could not do so without the permission of Mr. Hines? A. I don't know whether Sylvania was even brought up at that time.

Q. That certainly was the fact of the situation, was it not, that if Continental did intend to sell Sylvania merchandise in Sacramento that Mr. Hines, the district sales manager for that territory, would have to be contacted and approved? A. Yes, sir, I believe that's right.

Q. Now, didn't you in fact tell Mr. Hines, the Sacramento salesman—when you were at the Chicago convention that Continental might possibly open a Sacramento store? [251] A. I believe I mentioned it to him at the convention.

Q. What did Mr. Hines respond to you? A. I don't remember any response at that time.

Q. Didn't he say in substance he didn't know what could be done about it? A. I don't remember what his response was. I don't remember, really.

Q. I refer you to page 410 of your deposition, commencing at line 1.

"Q. Do you remember any discussion between the people I mentioned concerning Sacramento at all at any time at the Chicago convention?

"A. Not in any group meeting such as that. I don't remember any meeting at that time. I talked to Mr. Hines and said that there was a possibility that George Shahood might approach him on the possibility of a franchise for Sylvania in Sacramento.

"Q. And what did Mr. Hines say to that?

"A. I don't remember his exact words, something about how it could be worked out at the present time, or he didn't know what could be done about it.

"Q. Did he tell you why?

"A. I don't believe that he mentioned anything as to why. He handles his territory the same as I [252] handle mine; to the best of his ability and where he can get the best terms on the merchandise and exposure in his territory."

Mr. Miller: Q. Now, these questions, of course, were asked and you gave these responses under oath. Does that help refresh your recollection? A. Yes, I believe so.

Q. As far as you knew Hines followed the elbow room policy in his territory as you did in yours? A. Hines handles his territory the way—as I handled mine, I believe.

Q. All right sir.

* * *

[255] * * * Q. All right.

Now, Mr. French, in 1964 or 1965, did you have any dealers in your territory that in the usual course of business sold products in Sacramento? A. No, sir.

Q. Do you know of any dealer in San Francisco —strike that—in Mr. Hallday's territory in either of those years that in their normal course of business had a store in San Francisco but sold television sets to people in Sacramento? A. Not to my knowledge.

Q. Would your answer be the same for Oakland and Salinas? A. Yes, sir.

Q. Isn't it a fact, sir, that it is just economically not practical for a dealer to try to sell to people, let's say, over a distance of 50 or 75 miles away from his

store [256] and also service the sets and do the other things that are necessary? A. It is not economically feasible, but some dealers do it.

Q. To your knowledge Continental T.V. never attempted to do anything like that, did they? A. Yes, sir.

Q. How far would you say Continental T.V. attempted to serve its customers in volume from there—— A. In volume. Now, you see, you stated two different questions.

Q. What I am asking is simply this, Mr. French. You were pretty much personally aware of the volume of sale that Continental had in 1965, weren't you? A. Yes.

Q. You knew that they were selling several hundred sets a month? A. Yes, sir.

Q. What I am saying is that it is a fact, is it not, that Continental T.V. could not do that kind of volume in Sacramento from a location in San Jose? A. Would you state the question again, please.

Q. I am simply asking you is it not economically impossible or impractical, based upon your knowledge of this industry, for a dealer located in San Jose to sell [257] at a volume of several hundred sets a month to customers located in Sacramento? A. I would say that it is impractical, yes.

Q. Would your answer be the same if I asked you about a dealer located in San Francisco selling to a Sacramento audience? A. Yes, sir.

Q. Would it be the same if I asked you about an Oakland location? A. Yes, sir.

Q. Or a Salinas location? A. Yes, sir.

Q. Now, getting into August of 1965, of course, you received this large order, Exhibit R, for $112,000. Were you calling on Continental stores frequently? A. I believe I was.

Q. And did Mr. Shahood during the month of August again mention to you the fact that he was going to open a store in Sacramento? A. I believe he did.

Q. In fact, he told you that it would be open about the first week in September, didn't he? A. I believe so.

Q. Didn't he also tell you that he was planning a store in Vallejo? [258] A. Yes, sir.

Q. About the same time? A. Yes.

Q. He told you he had a lease for it and it would be soon open? A. Right.

Q. And he was planning to open the Vallejo store after the Sacramento opening, was he? A. I believe that was his plans.

Q. Now, as of August of 1965, had you told Mr. Shahood that he could not display and sell Sylvania sets in Sacramento without clearing the franchise with Hines? A. I don't know whether I did or not.

Q. You could have? A. I could have.

Q. That was the fact, of course, wasn't it? A. That's not my territory. I have no jurisdiction.

Q. I'd like to refer to page 444 of the deposition of Mr. French, line 2.

"Q. On this occasion did Mr. Shahood tell you he planned to open a Sacramento store around September 1st?

"A. That he planned to open a Sacramento store—

"Q. Around September 1st.

"A. Around September 1st, right.

[259] "Q. And he also told you that he had planned to have the Vallejo store opened soon thereafter, did he not?

"A. Right.

"Q. Now, previous to this date you had told Mr. Shahood, had you not, Mr. French, that he could not move Sylvania products into Sacramento?

"A. I had told Mr. Shahood that I have no control over the Sacramento area territory. And if he ever planned to use Sylvania in Sacramento, the franchise would have to be negotiated with Mr. Hines. As far as I can remember he was not still planning to use Sylvania merchandise in Sacramento."

Mr. Miller: Q. So, does this help refresh your recollection that you probably did tell Mr. Shahood previous to this August date? A. Yes.

* * *

[263] * * * Q. Okay. Now, you weren't aware of any credit problems of Continental as of late August, were you? A. No, sir, I don't believe so.

Q. You got the order here, Exhibit R and had that approved and Mr. Popolito was contacted? A. Yes.

Q. Everything was working pretty normally? A. Yes.

Q. As of August 27? A. I believe so.

Q. Mr. Steiner, when he was contacted about approving the mix of 25 H color sets on the August order, hadn't indicated any kind of payment problems? A. No, sir.

Q. Credit problems? A. No.

Q. Would this situation be the same if I asked you as of the first week in September? A. I believe so.

Q. You weren't aware, at least of your own knowledge, you weren't, of any problem with Continental, were you? [264] A. I don't believe so.

Q. You had not received any notification from Maguire about any unhappiness with Continental, had you? A. No, sir.

Q. You hadn't received any information from your own credit department about any unhappiness with Continental as of the first week in September, had you? A. No.

Q. Okay. Now, Mr. French, when were you first aware that Continental was actually in Sacramento at 1870 Fulton Avenue with Sylvania merchandise on the floor? A. I believe it was when Mr. Shahood called me.

Q. Do you recall the date? A. I don't, no.

Q. Early September? A. I believe it was the first part of September.

Q. All right. And what in essence did Mr. Shahood tell you at that time? A. I believe that he said that he had shipped some merchandise into Sacramento and was awaiting a clearance of a franchise, or something to that effect.

Q. That's right, Mr. Shahood called you, said "I have got my store open in Sacramento and I have shipped, as is our custom, merchandise for floor display and requesting franchise approval"? [265] Mr. Popofsky: Your Honor, he asked that question, with a precise answer and now there is a complete recapitulation by counsel. I object to it.

The Court: I think you did put quite a few condtions on, Counsel.

Mr. Miller: Very well, Your Honor. Let me withdraw it.

Q. I want to be sure the record is clear as to what you said, Mr. French. So you're saying Mr. Shahood on this occasion requested franchise approval for Sacramento? A. I believe so.

Q. Did he mention Vallejo? A. I am not sure whether that was mentioned then at that time or not. It was mentioned, I believe, before then. I am not sure whether it was restated then.

Q. All right. Up until this time have you ever known of any other dealer in your territory that had requested a franchise for Sacramento? A. Not to my knowledge.

Q. Up until that time had you ever known a dealer in Mr. Hallday's territory, San Francisco, that had ever requested a Sacramento location? A. I couldn't be sure. I don't know.

Q. What did you tell Mr. Shahood in response to [266] learning for the first time that Sylvania merchandise was in fact at 1870 Fulton Avenue in Sacramento? A. I told him that that would have to

be a franchise, or negotiated with Mr. Hines, I believe, in Sacramento. I believe that's it.

Q. Let's back up a minute. Did you tell him you would have to be approved at that location by Sylvania, in substance? A. I don't believe so. I believe I said that—I'm not sure, whether it was negotiated with Mr. Hines or approved franchise. I had no jurisdiction over that, that's all I know.

Q. Okay, and that's what you said in substance to him, is that right? A. Yes.

Q. You had no jurisdiction in Sacramento? A. Yes, sir.

Q. And you told him he would have to get the franchise approval from Mr. Hines? A. Yes, sir.

Q. Okay. Didn't you also tell him that if he remained in Sacramento with Sylvania merchandise against your company's wishes that he would jeopardize the orders that he had already placed with his company? A. That he would jeopardize his relationship with me.

Q. Did you tell him on that occasion that he would [267] jeopardize the fulfillment of the orders previously placed and accepted? A. I don't believe so.

Q. Did you tell him that if he maintained sets in Sacramento against Sylvania's wishes he would possibly jeopardize the entire relationship which would be a very poor thing to do because of the scarcity of color sets? A. I may have said something to that effect, yes, sir.

Q. What did Mr. Shahood respond when you expressed—explained these things to him? A. He said

if he couldn't get a franchise in there that he would bring the sets back.

Q. Guess he would have to bring them back? A. That he would bring them back.

Q. All right. He told you that? A. He told me that he would bring them back.

Q. Okay. And is that about the entire substance of that first telephone conversation? A. I believe so.

Q. Did you ever tell Mr. Shahood if he intended to stay in Sacramento against the wishes of Sylvania that he should wait until he received all the previous orders that he had made? A. I don't remember it.

Q. I would like to refer you to Page 445 of Mr. [268] French's deposition, commencing at Line 4.

"Q. Didn't you tell Mr. Shahood previous to this August 16 meeting that if he had to display and sell Sylvania products in Sacramento to at least wait until his previous orders had been shipped and delivered before he made any move in that direction?

"A. I——"

Mr. Miller: If Your Honor please, I am going to read the answer the way it was originally given under oath and transcribed and then I will read the answer the way it has been corrected by the witness.

The Court: Very well.

Mr. Miller: The original answer as transcribed under oath:

"I told Mr. Shahood that he should wait until any orders were placed and shipped before he

even made any request for Sylvania franchise in Sacramento, if he so desired."

Q. Now, you were given an opportunity to correct this deposition some weeks after you were deposed, Mr. French, you remember that? A. Yes, sir.

Q. This is one of the passages that you corrected. I will read the correction next.

"A. There was no reason for such a statement at [269] this time. No franchise had been requested for Sacramento and all orders were being shipped."

Now, sir, then between the time of your first answer and the time you corrected that passage did you talk to counsel? A. No, sir, I don't believe so.

Q. Did you talk—— A. I believe in reading the deposition that the formation of chain of events made it unnecessary to make that answer.

Q. All right. A. And it just didn't fit into the sequence of operational questions, to the best of my knowledge.

Q. The first answer I read to you, Mr. French, is the answer you did in fact give under oath in the deposition, isn't that right? A. I believe that it is.

* * *

[270] Q. Do you remember when you told Mr. Shahood that he should consider whether or not he was jeopardizing his entire relationship over the Sacramento issue? A. Yes, I believe I remember.

Q. What you meant by that was that he should assure himself that Mr. Hines was going to give him

approval because you did not have the authority to make that approval yourself? A. I had no jurisdiction.

Q. That is right, but isn't that what you told Mr. Shahood? A. I told Mr. Shahood that I did not have any jurisdiction in Sacramento.

Q. And that if he went ahead without getting Mr. Hines' approval he might consider jeopardizing the entire relationship, correct? A. With me.

Q. What did you do after talking to Mr. Shahood and learning that the merchandise was in Sacramento? A. I believe I called Mr. Steiner on that day.

Q. That's right. But before that you called Mr. Hines, didn't you? A. I don't believe so.

Q. Pardon? A. No, sir. Again, what day is it that I am talking about here?

[271] Q. I am talking about the next thing you did after you talked to Mr. Shahood and found out that sets were up there in Sacramento? A. What day was it that Mr. Shahood called me?

Q. You placed it on September 3 in your deposition. A. Which is on what day?

Q. That would be a Friday. A. A Friday. Then I called Mr. Steiner before I called Mr. Hines.

Q. I refer you to Page 481 of your deposition, starting at Page 7:

"Q. Was there any further conversation concerning this matter that you recall that you had with Mr. Shahood on this occasion?

"A. Not that I recall.

"Q. Now, two days later on a Sunday, September, 1965, you phoned Mr. Hines in Sacramento to discuss this thing, didn't you?

"A. I phoned Mr. Hines and said that there was merchandise in, that George had moved some merchandise in Sacramento.

"Q. That was on Sunday, September 5?

"A. Right."

Does that refresh your recollection? A. I knew I called Mr. Hines on Sunday. If I called [272] somebody else before—immediately afterwards was the question you put to me, immediately afterwards. I talked to Mr. Shahood, I called somebody, I couldn't have called Hines immediately after. One was on Friday and one was on Sunday.

Q. Do you recall calling anyone else between the time you talked to Mr. Shahood on Friday and the time you called Mr. Hines on Sunday? A. I am not sure if I called Mr. Steiner now or not.

Q. Okay. Let me move on to Sunday's conversation. You called Mr. Hines. You—he is your counterpart in Sacramento? A. Yes, sir.

Q. And you for the first time told Mr. Hines that Continental had Sylvania merchandise in his territory, correct? A. I believe that was the first time, yes.

Q. Did Mr. Hines give any indication that he had known of this before your call? A. No. sir.

Q. Did you tell Mr. Hines that Continental T.V. was requesting a franchise for the Sacramento location? A. Yes, sir.

Q. And did you mention also that—Vallejo? A. I believe that I did, I am not sure.

[273] Q. All right. And Mr. Hines responded in what manner? A. I believe that he said he didn't know what could be worked out at that time due to the commitments that Handy-Andy had made to him.

Q. Said he didn't know what could be worked out because of commitments which Handy-Andy had given him? A. Or with—yes, I believe so.

Q. Did he not say because of commitments which he had given Handy-Andy? A. No, sir.

Q. Did he mention Keith Anderson's name in that conversation? A. I couldn't be sure whether it was Keith Anderson or Handy-Andy.

Q. Keith Anderson is the owner of Handy-Andy, right? A. Yes, sir.

Q. You knew that at that time? A. Yes, sir.

Q. You also knew that he was the major Sylvania dealer in Sacramento? A. Yes, sir.

Q. Did Mr. Hines in this telephone conversation on Sunday offer to work out any meeting between the dealers or any other kind of accommodation?

[274] A. I don't believe so.

Q. Didn't talk about it? A. I don't remember any conversation.

Q. Now, you recall any other thing about that Hines conversation on Sunday? A. No, sir.

Q. Okay. Now, do you recall that it was after talking to Hines on Sunday that you talked to Mr. Steiner in Batavia? A. It is very possible. I don't know the sequence of those calls.

Q. So on Friday, try to straighten the sequence out for you, on Friday you talked to Mr. Shahood?

A. Evidently it was in the late afternoon that Mr. Shahood called me.

Q. On Sunday you talked to Mr. Hines in Sacramento? A. Yes.

Q. Correct? A. Yes, sir.

Q. Monday was a holiday, Labor Day, correct? Remember that? A. If you say so. I don't remember.

Q. If you don't, tell me. All right. Tuesday, then, was the first day—

Mr. Popofsky: Stipulate that Monday was a holiday.

[275] Mr. Miller: Thank you.

Q. Tuesday was the first work day in that week. Will that help you to refresh your recollection in this period? A. Yes, I think so.

Q. All right. And do you recall that on that first work day the 7th of September, you placed a call to Batavia? A. Yes.

Q. You talked to Mr. Steiner, the national sales manager, correct? A. Yes, sir.

Q. You told Mr. Steiner that Continental had moved sets into Sacramento and was requesting a franchise for Sacramento and Vallejo, did you not? A. I believe so.

Q. Did you tell him that you had just talked to Hines two or three days previous? A. I think I did.

Q. Did you tell him what Hines had indicated to you? A. I believe so.

Q. What did Mr. Steiner say? A. Something like he'll get back to me, or something like that. I don't believe I got any direct answer at that time.

Q. He said in substance, did he not, "I will check into this and get back to you"? [276] A. I believe that he did.

Q. Okay. And did you hear from Mr. Steiner again the same day? A. I believe so.

Q. Still September 7. A. I believe so.

Q. About how long after your first call, any recollection? A. I don't remember.

Q. A couple of hours? A. Probably two to three hours, I couldn't say.

Q. What did Mr. Steiner, what did he tell you, what did Mr. Steiner tell you when he called back? A. I believe he said that it couldn't be worked out at that time for Sacramento, that there was a possibility of Vallejo and what was Mr. Shahood going to do with the merchandise that he had in Sacramento, if I recall.

Q. All right. Did Mr. Steiner in fact tell you that it was impossible to franchise Sacramento for Continental at that time? A. I believe so. I don't know.

Mr. Popofsky: If Your Honor please, he just gave a precise answer in his own words and now he is restating it. This is cross-examination, but that isn't testifying through the witness.

[277] Mr. Miller: Your Honor, I am trying to make this as precise as I can because it is rather crucial.

The Court: Said it could not be worked out, was the phrase he used.

Mr. Miller: I am trying to point out to the witness what Mr. Steiner actually said, was that it was

impossible. I suppose you can use them as synonyms, but they may have some stronger meaning one way or the other.

The Court: Is that the word in the deposition?

Mr. Miller: Yes, sir.

The Court: You might read it.

Mr. Miller: Let me do that, commencing at Page 485, Line 5:

"Q. Did Mr. Steiner say anything before he said he would phone you back?"

This is the previous call.

"A. No, he said he would get back to me on it.

"Q. How long a period elapsed between that phone call and Mr. Steiner returning the call?

"A. I don't remember; a couple of hours, possibly.

"Q. Do you have any information as to who Mr. Steiner talked to in that interval?

"A. No, I do not.

"Q. But Mr. Steiner did call back the same day, I take it?

[278] "A. Yes, I believe so.

"Q. And what did he say?

"A. He said that it was impossible at the present time to grant a franchise for Sacramento, that they would like to negotiate with George for a Vallejo franchise.

"Q. Did they say why it was impossible?

"A. No.

"Q. Did he say anything else?

"A. No.

"Q. What did you say?

"A. Nothing, that I know of. I can't recall anything."

Now, does that help refresh your memory, sir, as to what term or terms Mr. Steiner used when he spoke of the franchise situation in Sacramento? A. He could have said impossible, yes. Or I could have used the word myself.

Q. Now, as a matter of fact, you haven't known until this day who Mr. Steiner may have talked to in that interval? A. No, sir.

[Continued on next page; nothing omitted.]

[279] Q. Okay. Now, what did you do after you talked to Mr. Steiner a second time and found out that it was impossible to franchise Continental in Sacramento? A. I called George back, I believe.

Q. Okay. And you in substance told him exactly what Mr. Steiner had told you? A. Yes.

Q. And you told him further that this had come from Mr. Steiner? A. That's what had come from Mr. Steiner.

Q. Let me back up.

You talked to Mr. Shahood after the second Steiner call. You told Mr. Shahood that Mr. Steiner had told you that it was impossible to franchise Continental in Sacramento, isn't that right? A. If those are the words I used, yes.

Q. In—my only point was that you told Mr. Shahood on that occasion that that decision had been made by Mr. Steiner? A. Yes.

Q. Now, Mr. Shahood responded that in the interim he had talked to his attorneys, isn't that right?

A. Yes.

Q. And that he had been advised that Sylvania could not dictate to Continental respecting the locations where [280] they could sell merchandise? A. I expressed his feelings on that, yes.

Q. And he told you also that Continental was going to sell merchandise in Sacramento and specifically was going to sell Sylvania merchandise, correct? A. I believe he did.

Q. And this still was on the same day, was it not, September 7th? A. Yes.

Q. Did you tell him the part about the possibility of being granted a Vallejo franchise? A. I think I did.

Q. Okay.

Now, what did you do after learning from Mr. Shahood that Continental T.V. was going to break away from this pre-approval of franchise locations? Did you talk to anyone else in your company? A. I don't believe so at that time.

Q. Don't you recall, sir, that you again called Mr. Steiner, your third conversation with him on the 7th? A. I may have. I thought you said someone else.

Q. I am sorry.

You again talked to Mr. Steiner, do you call, phoned him back? A. Yes.

[281] Q. And in substance what did you tell Mr. Steiner? A. Mr. Shahood had the merchandise in Sacramento and would not fulfill his promise to me to bring the merchandise back.

Q. And you also told him that Continental had received legal advice, didn't you? A. Yes, sir.

Q. Okay. Mr. Steiner in substance told you in response to that that you would have no further contact with Continental T.V. or Mr. Shahood, did he not? A. I am not sure.

Q. I would like to refer to Page 491 Line 10.

"Q. Now, in the same telephone conversation Mr. Steiner told you also, Mr. French, did he not, to have no further contacts with Continental representatives and to have your phone calls screened?

"A. Yes.

"Q. He told you not to talk to any Continental people, did he?

"A. He told me not to have any contact with Mr. Shahood specifically."

Now, you made those responses, sir? A. I did, but I am still not sure that it was Steiner or John Morgan.

Q. You talked to John Morgan a few days later after [282] the Steiner calls? A. That is true. I believe it was John Morgan that told me not to have anything to do with it. Honestly, it is in the deposition as such, but I think by reading further in the deposition that it clarifies itself. It did to me

Q. John Morgan, sir, was the vice-president in charge of sales for your company? A. That is right, sir.

Q. And that's the gentleman you just referred to? A. Yes, sir.

Q. And you in fact did have a telephone conversation with Mr. Morgan some six days after these telephone calls with Mr. Steiner, didn't you? A. Yes, I believe I did.

Q. You are telling me now that despite what you said in your deposition you don't know at this point whether Mr. Morgan told you to screen your calls and stay away or Mr. Steiner told you that, is that right? A. That is right.

Q. Didn't you learn about the same time from Mr. Lopolito, the credit man, that his boss had given him the same instructions about the same time to screen his calls and to stay away? A. Whatever the time was, yes.

Q. You learned that, didn't you? **[283]** A. In the same sequence, yes.

Q. Now, Mr. French, besides Continental T.V., do you have any personal knowledge of any other dealer in your territory who ever tried to sell merchandise from a location that was not franchised? A. Not to my knowledge, no.

Q. How about Robert E. Lee? A. Oh, yes.

Q. As a matter of fact, Mr. French, since you have been in California from January 1963 to the present time, there are only two dealers who ever tried to display and sell merchandise from a non-franchise location to your knowledge; isn't that right? A. Yes, I believe so.

Q. And those two dealers are Continental T.V. and Robert E. Lee; is that a fair statement? A. Yes, sir.

Q. I am going to talk to you about Robert E. Lee.

Was Robert E. Lee a franchise dealer when you got to California in January of 1963? A. He was dealing with Sylvania merchandise, yes.

Q. And he was one of the dealers that you franchised initially, correct? A. Yes.

Q. What was his other store? **[284]** A. In Hayward.

Q. That was his branch store, wasn't it? A. Yes, sir.

Q. And he had a main store also? A. Yes.

Q. Where was that located? A. Berkeley.

Q. So in 1963 did you franchise both stores or just one store? A. Just one store.

Q. As a matter of fact, he wasn't interested in a Sylvania franchise for his Berkeley store in 1963, was he? A. No, sir.

Q. He didn't request it? A. No, sir.

Q. You didn't offer it? A. No.

Q. So you franchised him in Hayward, correct? A. Yes, sir.

Q. And you used the standard written franchise form we see for Continental? A. Yes.

Q. And you made the same verbal representation to him that he needed approval before he could sell from any other store should he so desire in the future? **[285]** A. Yes.

Q. Now, he became a pretty good volume dealer for you in 1963, didn't he? A. Pretty fair.

Q. Do you recall, was he purchasing in carloads or half carloads at a time? A. I believe he had purchased a couple half carloads orders.

Q. He was doing fifty, sixty thousand dollars a year with you? A. Yes.

Q. Selling good color volume? A. Yes.

Q. All right.

Now, in June of 1964 Robert E. Lee made a decision to sell Sylvania merchandise from his Berkeley main store and he moved merchandise to a location without your permission isn't that right? A. Yes.

Q. Now, Berkeley at that time was being covered by Mr. Carroll, isn't that correct? A. I believe so.

Q. It was probably just before Mr. Hallday started with the company. So Mr. Carroll was covering that territory? A. Yes.

[285-A] Q. Mr. Carroll was opposed to the franchise for Mr. Robert E. Lee in Berkeley was he not? A. I believe he was.

[Continued on next page; nothing omitted.]

[286] Q. And his reason, was it not, was that a dealer named Dale Sanford T.V. was his big—Carroll's big—Berkeley dealer? A. Mr. Carroll never gave me his reasons. I don't believe so.

Q. Don't you know of your own knowledge, sir, that the reason for Sylvania's displeasure that having Mr. Robert E. Lee move sets to Berkeley was that he was then in competition with Dale Sanford? A. As far as I know Robert E. Lee only moved some portable black and white merchandise into Berkeley.

As far as I know for rental to the college students.

Q. And competition with Dale Sanford hadn't anything to do with it? A. I am not saying that competition may not have had anything to do with it. I don't know.

Q. You don't know? A. There wasn't enough merchandise there that I know of.

Q. I would like to refer the Court and counsel to page 101 commencing at line 22.

"Mr. Miller: Q. You were at the Robert E. Lee store?

"A. I was at the Robert E. Lee store calling on Sal Talisford who was the manager at that store.

[287] "Q. And that's a large order for you?

"A. Yes. He did a darn good volume. Probably one of our better. He was probably moving as much color as any dealer that I had.

"Q. All right.

"Is that part of your Alameda County District?

"A. Yes.

"Q. And are they still with you?

"A. No, sir.

"Q. When did they terminate?

"A. When did they terminate?

"They terminated in—let's see now—we are in March of 1964—I believe they were terminated in June or July of that year.

"Q. All right.

"For what reason were they terminated?

"A. The basic reason that I couldn't—I didn't feel justified in calling on them and continuing in business.

"Q. Was it because they could not or would not furnish what you felt was a representative display of the products?

"A. No, sir, it was not.

"Q. What was the reason, sir?

"A. The reason was because he was moving [288] merchandise then to his store in Berkeley that was not franchised.

"Q. Was that a Robert E. Lee store in Berkeley?

"A. Yes.

"Q. And Berkeley is not your territory, is it?

"A. It is not my territory and it was not—was not in the best interest of Sylvania at that time to handle Sylvania in that area.

"Q. Was that Mr. Hallday's area?

"A. That was Mr. Hallday's area.

"Q. Why was it not in the best interest of Sylvania to handle products in Berkeley at that time through Robert E. Lee?

"A. Because we had franchised the one store for him. This was the store that he had a franchise in. In moving the franchise into Berkeley, he was in an area that one of our major dealers was in that had made a fair commitment, and with the volume of movements Mr. Hallday had to have, he had to rely on that dealer, and it was not in the best interest of Sylvania or my territory to let him move merchandise out of my territory. I have control of my territory and can franchise a dealer in my territory.

"Q. Well, was the major problem a loss of merchandise from your area or was the major problem of [289] having Robert E. Lee doing business in Berkeley with Sylvania products?

"A. There was no major problem as far as the loss for my territory was concerned.

"Q. What was the name of the other dealer who Mr. Hallday was getting enough volume through in Berkeley?

"A. Dale Sanford."

I would like to refer the Court and counsel to page 105 briefly at line 3.

"Q. Would you say that the reason the franchise in Hayward was terminated for Robert E. Lee was because he was taking Sylvania merchandise and displaying it in Berkeley?"

Skipping to line 10:

"The Witness: Basically this is what it is. I am making a living out of my territory and Jay Hallday is trying to make a living in his territory. It is certainly not in the best interest of Jay Hallday for me to let someone else send merchandise into his territory, and I in turn would be quite upset with Jay Hallday if he set up a couple of three dealers up in my territory and started shipping merchandise in to upset the dealer movement and the dealer sales that I have generated with my dealers. [290] It is respect as far as salesmen are concerned. We have a responsibility in our own district."

Okay. Now, does that help refresh your recollection, Mr. French, that the reason Sylvania, as specifically you and Mr. Carroll, did not want a Robert E. Lee merchandise in Berkeley was because he was in competition in Berkeley with Dale Sanford? A. My reason was the respect for the other salesmen.

Q. You gave these responses I just read under oath. A. That is right and all of them to the respect for the other salesmen.

Q. Is it your testimony now, sir, in Court that the reason that Robert E. Lee was terminated was not because he moved merchandise into Berkeley, but for some other reason? A. The reason that he was terminated as far as I am concerned is because there is a verbal agreement that he is to get a franchise for an area store that he goes into and he had not kept that agreement with me.

Q. All right. So for that reason you terminated him, correct? A. Yes, sir.

Q. Basically what you are telling me, is it not, Mr. French, that if you couldn't control, for example, Robert E. Lee as far as locations, you did not want him as a dealer at all? [291] A. If I don't have the dealers integrity, why, it is pretty hard to do business with him.

Q. And you won't do business with a dealer, will you, sir, unless you can control the location from which—— A. Well—— .

Q. Let me finish.

——you will not do business with a dealer and you would not in 1964 and 1965 unless you as the district sales manager could control the locations from which that dealer displayed and sold Sylvania merchandise, isn't that true? A. If it is a matter of getting agreement with the dealer, sir.

Q. And that was the problem with Robert E. Lee, was it not, in 1964? A. That our relationship had been severed, yes.

Q. The reason was that you couldn't control the location from which he was doing—— A. He had broken the agreement with me.

Q. And that agreement was that he would get your permission before he sold from another location? A. That is right.

Q. Okay.

Now, Mr. French, do you recall that some six days after these telephone conversations with Mr. Steiner that you were again in the Stevens Creek store, Continental Stevens [292] Creek store in San Jose? A. I believe so.

Q. And you had gone there to discuss service problems? A. Yes, sir.

Q. And while you were there you had a conversation with Mr. Shahood, correct? A. Yes.

Q. Mr. Shahood asked you on that occasion to take an order, a stock order for a Sacramento location, did he not? A. I believe so.

Q. What did you tell Mr. Shahood? A. I told him that I had no right to take an order for my location out of my territory.

Q. And that didn't satisfy Mr. Shahood, did it? A. No, sir.

Q. As a matter of fact, Mr. Shahood sat down or had his managers sit down at the typewriter and type up a list of merchandise in lieu of an order form? A. Yes, sir.

Q. Let me show you Exhibit X, Mr. French. Look it over and see if you have seen it before. A. I believe so.

Q. Isn't that the order that Mr. Shahood typed up or had prepared on his typewriter on the Alameda letterhead of [293] Continental T.V.? A. It looks like it.

Q. Dated September 13. You recognize that as Mr. Shahood's signature? A. Yes, sir.

Q. And you wouldn't give Mr. Shahood an order form for this, would you? A. No, sir.

Mr. Miller: We would offer this as our exhibit next in order.

Mr. Popofsky: No objection.

The Court: Admitted.

The Clerk: Claimant's Exhibit X introduced and admitted in evidence.

(Claimant's Exhibit X marked and received in evidence.)

(Continued on next page.)

[294] Mr. Miller: Q. Now, you had occasion while at the Continental store on the 13th of September to place a call to Mr. Lopolito's offices in Los Angeles, do you recall? A. Yes.

Q. And you were talking to the warehouse people down there about some parts? A. Service department, yes, sir.

Q. Mr. Shahood requested that while you were on the line you should try to get ahold of Mr. Lopolito for him? A. Yes, sir.

Q. Did he tell you why he was asking to place a call to Mr. Lopolito? A. I believe he said that he hadn't been able to get through to him, or find him, or something.

Q. He had been trying to contact him for some time and Mr. Lopolito was always out to him? A. I believe so.

Q. That's what he told you anyway, correct? A. He said he couldn't contact him.

Q. And you did in fact get Mr. Lopolito on the phone line, didn't you? A. Yes.

Q. And then you gave the phone to Mr. Shahood and they had some conversation in your presence, at least you heard Mr. Shahood's end of it? [295] A. Yes.

Q. Mr. Shahood asked Mr. Lopolito on that occasion whether there was any credit reason, any credit reason why the Sacramento order, Exhibit X, could not be accepted and approved; isn't that what you heard? A. I believe that he did, yes.

Q. Of course, you didn't hear Mr. Lopolito's response? A. No.

Q. Did Mr. Shahood tell you thereafter what the response had been? A. I think that he said——

* * *

[296] Mr. Miller: Q. What was indicated to you? A. I believe Mr. Shahood told me that Mr. Lopolito had told him that there was—he could see no problem with it. I believe that this was his remarks.

Q. Right. No credit problem. A. I don't know of there being any problem.

Q. And you had not been informed of any credit problem up to this date, the 13th of September? A. No, sir.

Q. So, with some inducement I am sure you were given—you took the order, you took the order from Mr. Shahood, Exhibit X. I mean, you physically took it. A. With some inducement.

Q. You physically took it, correct, sir? A. Yes, sir.

Q. What did you do after that? A. I mailed it into—I called Batavia, I believe.

Q. You called Batavia. Who did you call for? A. Steiner. Steiner wasn't there, so I talked to John Morgan, I guess.

Q. You finally got through to Mr. Morgan, the vice president for sales of Sylvania's sales corporation? A. Right.

Q. Where did you make this call from? Your home? [297] A. No. I stopped at a phone booth on the way home, because it was getting late I believe for Batavia.

Q. It was your concern that Batavia know about it that day? A. Yes, I believe so.

And it was getting late in the afternoon. Batavia would be closed, so I did stop in at the phone booth.

Q. What did you tell Mr. Morgan when you got him? A. That I had in my hand an order, or stocking order for Sacramento.

Q. What was Mr. Morgan's response to that statement? A. Well, mail it to me.

Q. Didn't he first tell you that you should not have taken it? A. Yes.

Q. And didn't he become angry on the phone? A. Yes, I believe so.

Q. And didn't he say in substance, "Why did you take this order?" A. Yeah, why did I take it.

Q. Yes. What did you tell him? A. I told him that it was a matter of taking it or Mr. Shahood was going to send it extra special delivery.

Q. Then at that point, vice president Morgan told you for you to stay away from Continental and to have your [298] calls screened so that you would have no chance to talk to him? A. I believe he did.

Q. That's when it happened? A. Okay. All right.

Q. And Mr. Morgan told you something else, isn't that so, after telling you to stay away and to have your calls screened? A. I don't remember.

Q. Didn't Mr. Morgan on that occasion, sir, the vice president, tell you that if Continental T.V. asks about their previous orders that had not been shipped to date to tell them that they were being held for credit review? A. Yes.

Q. He made that statement? A. Yes.

Q. Mr. Morgan wasn't in the credit office though, was he, of your company? A. I don't believe so. No.

Q. He was vice president in charge of sales, was he not? A. Right. Yes, sir.

Q. Now, after the Morgan conversation on the 13th of [299] September, did you talk to Carroll or Mr. Steiner again about Sacramento? A. I believe so, but I don't know just when. I think Carroll and Steiner were both out of town, or out of their offices. That's the reason why I talked to Mr. Morgan.

Q. Didn't, in fact, Mr. Steiner return your call either the same day or the next day after you talked to Mr. Morgan? A. I can't be sure about that.

Q. I'd like to refer you to page 497 of your deposition, line 1.

"Q. You say it was in this conversation that Morgan may have instructed you about what to tell Shahood if he requested information about his previous order?

"A. Either in this conversation or in the subsequent conversation; that is, the same day or other calls that Mr. Morgan was the only one in. Mr. Carroll or Mr. Steiner were not in, and they called me back on the phone again that afternoon, I believe, or early the next morning."

Mr. Miller: Q. You gave me that response, obviously, in your deposition. Do you recall anything about what you and Mr. Steiner or Mr. Carroll discussed the day, the same day, [300] or the day after? A. I don't.

Q. About a week later Mr. Carroll is back in San Francisco, correct? A. Yes.

Q. And you do meet with him in San Jose, I think it is, and you discuss something about the Sacramento situation, don't you? A. I believe so.

Q. And, in fact, at that time weren't you proposing that somebody like Mr. Steiner or Mr. Morgan, or even Mr. Theis, the president, come out to the coast and sit down with Mr. Shahood? A. I certainly hated to lose my volume.

Q. You were suggesting this to Mr. Carroll, weren't you? A. I believe so.

Q. You were looking for a resolution of this thing? A. Yes.

Q. And what was Mr. Carroll's response? A. I believe that he said at that time that something to the effect that you can't negotiate with someone with a gun at your head, or something like that.

Q. That's correct.

He also told you, did he not, that the Sylvania [301] sets that Continental had in Sacramento were out of trust? Do you recall that? A. I believe so.

Q. Mr. Carroll told you that? A. I believe so.

Q. Right. Now, Mr. Carroll wasn't a credit man, was he? A. No.

Q. He was a salesman? A. Right.

Q. And what did you understand the term "out of trust" to mean? A. You are asking for my understanding about a trust?

Q. Yes. In the sales department—now, Mr. Carroll used this term to you. A. In merchandise that is on floor, trust set with a dealer that has moved from the location that it is supposed to be in and supposed to be paid before it is taken from the location.

Q. So you understood this to be some kind of a violation of the financing terms with Maguire? A. I assume it to be.

Q. That's the way you understood it? [302] A. That's the way I assumed it to be.

Q. That's the way you understood Mr. Carroll used it? A. Yes.

Q. Now, as a matter of fact, you even told George Shahood the same thing, that these sets were out of trust in Sacramento, didn't you? A. As far as my

own personal opinion, I have no—I am not a financing man.

Q. I appreciate that. Do you recall making a statement to Mr. Shahood? A. I believe that I did.

Q. Now, as part of your duties, sir, you fill out certain reports, and one of those reports is a daily call report? A. Yes.

Q. Do you still do that? A. No, sir.

Q. But in 1965, that was one of the requirements of your job, correct? A. Yes, sir.

Q. And the day that you talked to John Morgan, the vice president, and he told you that, "Tell them there is a credit review if they ask," and the day you were at Continental and they gave you this exhibit X order for [303] Sacramento, you prepared a call report of your activity for the day, did you not? A. Uh huh.

Q. Is that your signature on that document? A. Yes, sir.

Q. And what is the date? A. September 13.

Q. Do you show a call to Continental T.V.? A. Yes, sir.

Q. Does it show how many hours you spent there? A. Yes.

Q. How many? A. About three hours.

Q. Does it show the person you contacted? A. George Shahood; yes, sir.

Q. And then there is a section for comments, isn't there? A. Yes, sir.

Q. And under the comment or the remarks section at one place it says: "Still can't get merchandise out of Sacramento, but I feel it will be done shortly."

Now, you printed that in the comments section, did you, sir? A. Yes, sir.

Q. And that was the same day you talked to John [304] Morgan on the phone? A. I believe so.

Mr. Miller: I would offer this as Claimant's next as offered.

Mr. Popofsky: No objection.

The Court: May be admitted.

The Clerk: Exhibit W introduced and admitted into evidence.

(Claimant's Exhibit W marked and received into evidence.)

* * *

[310] * * * Q. Now, you attended a meeting the evening of October 13, did you not? A. Yes.

Q. Where was that meeting held? A. At the Burlingame Hyatt House, I believe.

Q. Who was in attendance from your company? A. Mr. Carroll, Mr. Lockhart, Mr. Lopolito, myself, [311] I believe.

Q. How about Mr. Rivers? A. Mr. Rivers, I believe he was there, yes.

Q. Mr. Rivers was then the national credit manager? A. I believe so. I don't know exactly what Tom's title was.

Q. Who was present, to your recollection, from Maguire Company? A. Mr. *Pedlow* and Mr. Petrick. I believe those were the only ones.

Q. Now, Mr. Lockhart, the controller of Sylvania, J. Lee Lockhart, made some introductory statements at this meeting, did he not? A. I believe he did, yes, sir.

Q. Did he not say that, to those assembled, that they should remember this is a Maguire action and not a Sylvania action? A. I'm not sure of his exact words, something to that effect.

Q. Well, he did that—— A. Sylvania, that Sylvania, that they were—they were there to identify Sylvania merchandise, that—I'm not sure of his exact words.

Q. All right, sir, but in substance he did tell those assembled that the merchandise was picked up because of lack **[312]** of payment, didn't he? A. I believe that was what he said.

Q. Then Mr. Pedlow took over the meeting, didn't he? A. I believe so.

Q. Mr. Pedlow was a vice-president in charge of flooring for Maguire Company, was he not, at that time? A. I don't know what his title was.

Q. But he worked for Maguire? A. Yes, my understanding.

Q. Okay. And he more or less reviewed the day's activities as an introduction, didn't he? A. I believe so.

Q. Okay. And didn't he cover the fact that the Federal Marshals were instructed that they were to treat Continental T.V. during this repossession as an ex-con operation? A. I believe that it was referred to as Mr. Shahood was referred to as an ex-con.

Q. And he was to be treated as such? A. To watch out for him or treat him under those conditions, or something such as that.

Q. You understood this to be on the instructions that were given by Sylvania and Maguire to the

Federal Marshals? A. By Mr. Pedlow, as far as I know.

[313] Q. Yes, to the Federal Marshals? A. That's as I understood, yes.

Q. And then didn't Mr. Pedlow cover the fact that the Federal Marshals patrolled all the store locations so that the repossession did proceed simultaneously from all stores? A. I believe so, yes.

Q. Did he mention why this was done? A. I don't know that he gave a reason for it.

Q. Mr. Pedlow also reviewed the fact that the main Continental T.V. bank accounts were simultaneously attached? A. He may have. There was some reference to the bank.

Q. All right.

And then as I understand it each of the various men at the meeting reviewed for Mr. Pedlow and Mr. Lockhart what occurred at their various locations as they helped with the repossession, correct? A. Yes.

Q. And generally speaking what did these people say about the cooperation or lack of cooperation of Continental people? A. They seemed to have pretty fair cooperation in locating the merchandise.

Q. Did Mr. Pedlow, the Maguire man, agree? **[314]** A. No, he said he had a little difficulty at the Santa Clara Store.

Q. And in substance didn't Mr. Pedlow say that some day somebody is going to get that little Dago down at the Continental main store? A. In substance I believe there was something mentioned about that.

Q. Did he use that term? A. He was being obstructed a little bit, I believe.

Q. Did he refer to the store manager at Stevens Creek in that phrase? A. I believe that that was the reference.

Q. That was Mr. Tony *Greco?* A. Yes.

Q. Of course, you had known Mr. Greco a couple of years by that time? A. Yes.

Q. Did you find him to be a cooperative person? A. He had always been with me.

Q. Now, they also discussed at this meeting, did they not, that Mr. Lockhart, the controller from Sylvania, was floundering around on Mr. Shahood's false ceiling over his office? A. Yes.

Q. And came crashing through it? **[315]** A. Yes.

Q. The chaining and the locking of the San Jose store, or the San Jose warehouse and the downtown San Jose store, that is, the Stevens Creek store, the downtown San Jose store and the San Jose warehouse, was that discussed? A. Yes, I believe they discussed that.

Q. Why was it necessary to chain and lock those stores and warehouses, any reason given? A. I don't know.

Q. Now, Mr. Pedlow at that time, Maguire Company's Mr. Pedlow, in fact told the people assembled at this meeting that Continental had lost its bank connections, isn't that true? A. I don't know that he said that they had lost them, he may have. There was a reference to the banking connections; I am not sure what it was.

Q. There was a reference made to Continental's banking connections, was there not? A. Yes, both retail and banking connections.

Q. And Mr. Pedlow in substance said that Continental's banking connections had probably been jeopardized, isn't that the substance of what he said? A. Something to that effect.

Q. To the group of people? A. Yes, I believe so.

[316] Q. And further that Continental's retail sales of contract paper, that is, the consumer paper that they sold to banks, that that part of their business had possibly been jeopardized? A. I believe that he made reference to that, yes.

Q. And he said that if that were the case Continental would suffer sales losses; he told the people that, didn't he? A. I think that he did. There was general conversation on that.

Q. In fact, didn't Mr. Pedlow tell the people there at that meeting that this discounting of consumer contract paper was the backbone of Continental's business? A. I believe that that was referred to, yes.

Q. And if it was lost Continental was going to suffer? A. I believe so.

Q. Now, Mr. Lockhart, the controller, Sylvania controller, had a conversation with Mr. Rivers, the Sylvania credit manager, in front of the rest of the people at this meeting concerning a man by the name of Bob Marks. Do you recall that? A. Yes, it was Mr. Rivers.

Q. Yes. A. Okay.

Q. And Mr. Lockhart in fact asked Mr. Rivers to call [317] Mr. Marks, did he not? A. Was it Mr. Rivers or Mr. Lopolito?

Q. Well—— A. I'm not sure.

Q. All right. A. I would like to clarify it.

Q. At Page 513, Line 24:

"Q. Now, at this meeting didn't Mr. Lockhart ask Tom Rivers if he was acquainted with the so-called manager by the name of Bob Mark?

"A. Right."

The Witness: Okay.

Mr. Miller: Going to Page 514:

"Q. What did Mr. Rivers say?

"A. He said yes, that he knew Mr. Mark.

"Q. Didn't he tell Mr. Lockhart he was a personal friend and had known Mr. Mark for a number of years?

"A. Yes, he said that he was a personal friend of his and that he had known him for some time."

Q. Now, that refreshes you? A. Yes. Thank you.

Q. Now, as a matter of fact, Bob Mark was the credit manager for Philco, wasn't he? A. I believe he was. I'm not acquainted with Mr. Mark.

Q. All right, sir. And Lockhart, the Sylvania [318] controller, asked Rivers, the Sylvania credit manager, to call Mr. Mark immediately to tell him what Sylvania-Maguire had done with the Continental, isn't that right? A. I don't know whether he said immediately. I think he did ask him if he would call him that evening.

Q. Didn't he ask Mr. Rivers to call that evening? A. Yes, I think that he did, yes.

Q. Mr. Rivers responded, did he not, that he was a personal friend of Bob Mark, the Philco man, and that he knew that Bob Mark had a sick child and he didn't wish to bother him that night? A. Yes.

Q. And further didn't Mr. Lockhart respond, "Well, if that's the case, be sure and call him the first thing in the morning?" A. I believe so.

Q. And further didn't Lockhart tell Rivers to call him in the morning before he goes to work? A. I believe he suggested that.

Q. Right. So apparently Mr. Lockhart, at least, indicated some urgency; is that your understanding? A. I believe so, yes.

Q. And Lockhart specifically told Rivers for Rivers to inform Bob Mark of Philco as to the actions taken that day? [319] A. Yes.

Q. Now, Mr. French, after the repossession had been completed, do you know where the merchandise was stored? A. I learned later, yes.

Q. How about the merchandise repossessed from the Sacramento store, was that stored in Sacramento? A. Yes.

Q. And how about the merchandise from the Geary Street store in San Francisco, was that stored in San Francisco? A. I believe so.

Q. Would the same be true for Salinas? A. Yes.

Q. And San Jose? A. Yes.

Q. Now, is it not a fact that Sylvania purchased back from Maguire all of the merchandise repossessed

from Continental T.V.? A. I would believe so. I don't know.

Q. Well, as a matter of fact, you resold that merchandise yourself? A. I resold it, but——

Q. All right. And who did you sell it to? A. *Alko-Paramount.*

Q. Alko-Paramount in San Jose? **[320]** A. Yes, sir.

Q. And that was accomplished late October, early November sometime? A. Somewhere in there.

Q. Okay. Of course, by that time wasn't it called Alko-Nelson, was there an Alko-Nelson also franchised? A. It was a partnership that was formed with two Nelson stores and one Alko-Paramount store and for delivery clarification they called the two Nelson stores Alko-Nelson, just for significance for a few months.

Q. So by the time you resold the merchandise repossessed from Continental T.V. Alko-Paramount, the dealer you had franchised in August, had become a chain around San Jose, had three or four stores? A. They had three stores when I franchised them.

Q. Okay. And they were a competitor of Continental in San Jose? A. They could be called a competitor, they are in the same town.

Q. Excuse me, Santa Clara was where Continental was. San Jose they had one store. They could be a competitor, yes.

Q. Santa Clara County. A. Santa Clara County.

Q. Now, did Sylvania pay the freight or the shipment **[321]** of all this merchandise to Alko-Nelson and Alko-Paramount? A. No.

Q. They did not? A. Not all of it.

Q. Well, they paid the freight for the shipment of sets from San Francisco to San Jose, didn't they? A. Yes.

Q. From Salinas? A. Yes.

Q. And whenever was necessary for freight from San Jose to Alko-Paramount stores, San Jose warehouse? A. Yes.

Q. It was only in Sacramento that Alko-Nelson was asked to pay the freight? A. Yes.

Q. Something approaching $80,000 worth of merchandise? A. I believe so.

Q. Now, there was some color merchandise in that repossessed lot of merchandise, weren't there? A. I'm sure there was.

Q. Was any of that colored charged against Alko-Paramount or Alko-Nelson's allocations? A. I don't believe so.

Q. So that Alko-Paramount got whatever their allocation **[322]** turned out to be plus they received the color sets in the repossessed merchandise, right? A. Yes.

Q. Do you have any recollection as to how much business Alko-Paramount did with your company in 1966? A. I would only be making a guess at this point.

Q. I don't want you to do that.

Isn't it a fact, sir, that Alko-Paramount took every color set made available to it from the fall of 1965 through most of 1966? A. I don't believe so.

Q. Did not Alko-Paramount at times demand more color sets than they were allocated? A. Through

the fall of '65 and maybe the first couple months of '66.

Q. Of course, many dealers were doing that at that time? A. Yes, that was the big color demand.

Q. Now, the fact that Continental had spent over a period of two years substantial monies advertising and promoting the Sylvania name in not only San Jose, Salinas, San Francisco, Oakland, didn't that inure to the benefit of Alko-Nelson in San Jose and the dealer you put on in Salinas after Continental was terminated? A. It may have.

[323] Q. You did put a dealer in Salinas on after Continental's termination, didn't you? A. Yes, sir.

Q. Packwood's? A. Yes.

Q. Really a replacement for Continental? A. It was another dealer.

Q. Well, you didn't put them on until Continental was terminated, did you? A. No.

Q. How did you do on your quota, Mr. French, in 1965? Did you make your quota? A. I believe I did.

Q. As a matter of fact—— A. Pretty close to it.

Q. When you say "made your quota" you are talking about 120 percent of the established quota, right? A. Yes.

Q. So you made at least 120 percent of your quota, right? A. Well, I am not sure of the figure, but I made my quota, I believe.

Q. That was 1.2 million that year? A. Somewhere in that area.

Q. Now, even though Continental was terminated in [324] October and received very little shipment after March and April, how much would you say of your total territory purchases did Continental account for in 1965? A. Gee, I don't know. Forty percent, maybe, somewhere in there.

Q. Wasn't it closer to 60 percent of your total territorial purchases? A. In '65?

Q. Yes, sir. A. I don't know.

Q. I refer to Page 88, Line 9:

"Q. What percent of these purchases were for colored products in 1965?

"A. I would say the overall picture was, would be around 60 to 70 percent.

"Q. And what percent of your total purchases were attributable to purchases by Continental Television in 1965"——

Skipping to Line 17.

"Q. Now, I am asking for 1965.

"A. Somewhere between 50 and 60, around 50 percent."

So with that refreshment of your recollection is it fair to say that Continental, even though it didn't receive many shipments after March of 1965, still attributed about 50 percent of your total territory purchases that year?

[325] A. Evidently they did.

Q. Now, I think on Friday you mentioned that the shortage period as far as you can remember was over sometime in the summer of 1966, Mr. French. Is it not a fact, however, that Sylvania continued to al-

locate color television sets to its dealers through November of 1966? A. I'm not sure.

Q. Could be? A. It could be, but many of the dealers were not taking their full allocation, starting, I believe, in March or April of that year.

Q. Well, starting with the allocation made for the first allocation period which was September and October of 1965? A. Yes.

Q. Is that true? A. Yes.

Q. Starting with the first allocation period it is a fact that the allocations made by Sylvania for their approved dealers increased right on through 1965 and through 1966 each allocation period, didn't they? A. Yes, I believe they did.

Q. And even though you mentioned that some dealers didn't use all their allocations, certainly it is a fact that many dealers needed more color than they were able to **[326]** get, particularly, in '65 and the first part of '66? A. Right.

Q. Now, is it not a fact, Mr. French, that Continental T.V. was allocated a certain number of sets for the first two allocation periods, September through December of 1965? A. I don't believe I ever got an allocation on Continental T.V.

Q. You had no information about Continental's allocation? A. No, I don't believe I was given a formal allocation.

Q. When did you receive formal allocations for the other dealers in your area? A. I believe it was in September.

Q. Late in September? A. I'm not sure just when it was.

Q. Now, Mr. French, at any time in 1965 were you ever aware of a complaint by Maguire that Continental was not computing its maturity items correctly? A. I don't understand what you are talking about.

Q. Okay. You do know that under the Maguire financing plan that after a dealer has a financed item on its floor for over six months the purchase price is due Maguire for that item, correct? **[327]** A. Yes, I believe that's the term in there——

Q. That term refers to such an item, matured item? A. Matured item, yes.

Q. Correct. My question simply meant to ask you whether at any time during 1965 you heard any complaints from anybody in Maguire that Continental wasn't computing their maturities correctly? A. I didn't hear any complaints about it.

Q. Did you hear any such complaints from anybody in your company? A. No.

* * *

[352] * * * Q. With respect, sir, to Continental Television and its related corporations, do you know what kind of sales technique they generally employed? If that's understandable to you. A. Yes, I believe I understand the question. Their sales were made probably 90 percent in the home on telephone leads.

Q. In the home on telephone leads? A. Yes.

Q. Is that the so-called home demonstration type of method of selling? A. Yes.

Q. Did Continental T.V.'s ad feature free-home demonstrations, that sort of thing? A. Yes.

Q. You mentioned the term advertising. Does that mean they would advertise $3 or $4 per month or per week? A. Yes.

Q. Rather than the total list price of the T.V. set? A. Yes.

[353] Q. Did Sylvania, to your knowledge, or you, to your knowledge, ever complain about this method of pricing? A. Well, we like to build a better image market wise than that.

Q. But aside from likes, performances, did you ever make any formal complaint to Mr. Shahood? A. Yes, I expressed my dislike for it.

Q. Did he go right ahead and continue to use his old policy? A. Yes.

We discussed that to some length at various times as to the need for such elaborate stores and elaborate displays, and the best stores in this whole area, but yet selling 80 to 90 percent of his sales in the home. There was very few customers that came in the stores to buy, at least during my relationship with him.

But again, Mr. Shahood was building a business, and he so informed me that this was one of the things that would be necessary for him to get the volume that was necessary to support these stores; that eventually he hoped that the stores could stand on their own and maybe wouldn't—he wouldn't go into so much of this type of advertising.

Q. Well, with this type of advertising feature, sir, do you know what retail prices he was charging? A. It varied, I believe. It wasn't—it was higher **[354]**

than our suggested retail price, especially in home demonstrations where he needed additional profits to pay the salesman contacting in the homes.

Q. Did you, sir, or to your knowledge anybody at Sylvania ever say to George Shahood that he had to bring his prices into line with Sylvania's suggestions? A. No. As a matter of suggestion I felt he might do a better job if he did.

Q. Did you ever made any threat to cut off Mr. Shahood or Continental T.V. by reason of the prices he charged? A. No, sir.

Q. Was price ever discussed at any time in any of the conversations you had and to which you have testified in connection with Sacramento? A. No, sir.

Q. Or Vallejo? A. No.

* * *

[375] * * * Q. Now, sir, you have testified in considerable detail concerning the sequence of telephone conversations which you had concerning Sacramento during late August and early September, 1965. And if I may, you described telephone conversations with Mr. Hines, Mr Steiner, Mr. Morgan.

One question counsel did not ask you is during your September 7 phone calls with Mr. Steiner did you discuss or did Mr. Steiner discuss a credit hold?

A. I believe he informed me at that time that there was a credit hold, that if Mr. Shahood asked concerning the orders that I was to advise him that there would be a hold **[376]** for a credit review. I believe that's the sequence.

Q. And that was a day or two after Mr. Shahood had told you he was moving merchandise into Sacramento? A. Yes.

* * *

[388] * * * Q. In addition to that, Mr. Shahood on behalf of Continental in Sacramento gave you an order on the 13th of September which he wanted you to place? A. Yes, sir.

Q. And that order was for about $80,000 of merchandise is that correct? A. Yes, sir.

Q. So if those orders had been shipped, all three, Mr. Shahood would have received about $255,000 in merchandise from July through October, right? If they had been processed and accepted? A. Yes, sir.

Q. And yet in Chicago he gave you an order for $220,000, and then withdrew it, as you say? A. Yes.

Q. Is it still your testimony that you thought that Continental T.V. was cutting down on its purchases of Sylvania products in the fall? A. Strictly a matter of personal opinion.

I am still writing orders. I have nothing to do with the credit. I am going to write orders just as long as I can get them.

* * *

Testimony of John T. Morgan

[395] * * * The Court: The usual procedure, ladies and gentlemen of the jury, is that where a person is not available and you have a deposition, that counsel read the question and that another lawyer take the witness stand and he reads the answer.

That's just in an effort to try to simulate the procedure in the event the witness was here.

The statements in these depositions were taken under oath, and they have the same weight that you would give the testimony of witnesses here personally.

You may proceed, counsel.

Mr. Miller: Thank you, Your Honor.

Commencing at page 4.

"Q. What is your full name, please?

"A. John Thomas Morgan.

"Q. Where do you reside, Mr. Morgan?

"A. 49 East Main Street, LeRoy, New York.

"Q. What is your official title with Sylvania at this time?

[396] "A. President of Sylvania Entertainment Products Corporation."

Mr. Miller: Page 5.

"Q. How long have you been employed at Sylvania, Mr. Morgan?

"A. Since 1962.

* * *

[400] * * * "Q. Do you know how Sylvania ranked in terms of total sales of television manufacturers in 1962?

"A. Certainly not very high. I think it would be right down at the bottom of the list.

"Q. Now in 1962, it is my understanding that Sylvania did not have a direct dealer program; it was a distributorship program, was it not?

"A. Right. It was distributors and branches. They had a direct dealer program, had gotten

onto one, off of one, onto one, this sort of thing. Again, 1962 they had nothing."

* * *

[402] * * * "Q. So you met Mr. Anderson in Fresno?

"A. Yes.

"Q. What did you discuss with Mr. Anderson at that point?

"A. I told him I thought Sylvania was a wonderful line for him and he should take it on.

"Q. Did you tell him he should drop the Philco line?

"A. Certainly not.

"Q. What did Mr. Anderson say to you?

"A. I had to sell him. I told him what we were **[403]** going to do, that this was an example of what we could do on products. We had advanced the line terrifically by June of '63, put through a lot of crash programs and brought out a line in '63 that just about turned this whole Sylvania product line around.

"Q. Were you successful in selling Mr. Anderson at this meeting in Fresno?

"A. Yes. I was successful to the point that they took me out to the plane and shook hands and he says, 'Okay, I will give your line a try.'

"Q. Did he place an order with you personally?

"A. No. I didn't take the order. No. I told him I would have the man call on him, and he did, and he got the order.

"Q. So the order would have to go through Harry Marco's office?

"A. No, it went through, at the time—no. We had Jimmy Hines in the territory.

"Q. So you had a direct dealer set up in Sacramento then, a direct dealer line?

"A. Yes.

"Q. And Mr. Hines, who is still over there, was the salesman?

"A. Right.

[404] "Q. Mr. Anderson didn't mention to you at that time that he owned any part of the Fresno distributorship?

"A. No.

"Q. Now, do you recall when the Fresno distributorship started purchasing Sylvania products?

"A. I think it was right at that time. They had a distributor here, and at that time I was Merchandise Manager. We had a vice president of sales, a guy by the name of Ken Connor. We had a distributor in the Fresno market and he was not doing anything. And I don't know who came up with H and A Distributing, but we were looking for a new distributorship here—

"Q. I see. So the distributorship that was there was not H and A?

"A. It was terminated, cancelled, and H and A was put on. So I met Jack Hastings for the first time as a brand-new distributor, and I came out and gave a talk to his dealer organization."

Mr. Miller: Page 34.

"Q. Did you meet Mr. Hastings at the same time you met Mr. Anderson in Fresno?

"A. Yes. Keith came down to the open house."

Mr. Miller: Page 35.

[405] "Q. Let's take it in this context: At some point in time it was decided that the San Francisco Bay Area should be a direct line area, direct dealer area?

"A. This was decided from the very first day that we put in the program, that we would close down all branches, and we did close down the branch."

Mr. Miller: Page 36.

"Q. Now when you came with Sylvania in 1962, '63, how many distributorships for Sylvania products were in California, if you recall?

"A. Were in California?

"Q. Yes.

"A. L.A. and Fresno.

"Q. Counting branches or private distributors?

"A. We had a branch in San Francisco. We had a distributor, an independent distributor, in Los Angeles, and we had an independent distributor in Fresno."

* * *

[411] * * * "Q. In 1965, Mr. Morgan, can you tell me approximately the dollar figure of brown goods sales for Sylvania?

"Mr. Popofsky: Total sales, is this, counsel?

"Mr. White: Yes, this includes all brown goods."

Line 24:

"Mr. White: Q. If you know offhand the approximate dollar volume for 1965?

"A. 1965, around 75 million.

"Q. 1966?

"A. Like 120 million."

Page 67, Line 12:

"Q. All right. Now are you familiar with the term "elbow room policy"?

"A. Yes.

"Q. This is a sales policy, is it not, a franchising policy for dealers?

"A. It's a term to describe fewer dealers in competition.

"Q. In 1962, when you came with Sylvania was there an elbow room policy of any type?

"A. No.

"Q. Whose idea was this?

"A. The term 'elbow room'?

[412] "Q. The policy itself.

"A. The franchise?

"Q. Yes.

"A. It was an agreement that Mr. Theis and I have this is the kind of program we were going to have, basically there was—I didn't feel, neither did Bob, that there was any other type of program that you could have."

Page 74, Line 6:

"Q. Since 1963 Mr. Hines has been the only district sales manager in the Sacramento area, right?

"A. Yes."

* * *

[418] "Q. Was this the policy of the operation in 1964 and '65, too?

"A. Yes."

* * *

"Q. Alco-Paramount presently has two or more stores in Mr. French's territory?

"A. Yes.

"Q. If Alco-Paramount wishes to open a store in San Francisco, does this have to be approved by Jay Hallday?

"A. Yes.

"Q. If Mr. Halliday disapproves the opening of this store, does that end the matter?

"A. Yes, we couldn't give them a franchise for that store. It would have also the approval, let's say by Don Carroll.

"Q. Now, if Mr. Halliday disapproves the store, but Mr. Carroll wants the branch store, I assume Mr. Carroll's decision would prevail?

"A. Right.

"Q. Now is there anything in writing that you know of that is given to a franchised dealer that limits the area where he can open a store?

"A. No, sir.

"Q. So the first knowledge a dealer would have is [419] when he goes to move into the other territory?

"A. No. There is—our dealers know we have a franchise and a franchise strictly means that—it works both ways. As a franchise he has it for those existing locations. Now he knows when he opens another store that he is going to ask us for a franchise and he can get a no.

"Q. How does he know this? How is the dealer advised he has to get another franchise to operate another store?

"A. I think every dealer knows our program. I mean that's the whole object of the franchise.

"Q. I am asking you, Mr. Morgan, is there anything in writing—

"A. No.

"Q. Or verbally in your program that explains to a dealer that says he has to be franchised for a new store?

"Mr. Popofsky: This is in writing or verbal?

"Mr. White: Right.

"The Witness: Not in writing but certainly verbal. I have said it from the stage. I have said it to the National Association of Radio Dealers of America.

"Q. Now what person or persons in your organization [420] are supposed to advise the dealer of this? The salesmen?

"A. Yes.

"Q. This is part of their program that they are supposed to outline to the dealer when they take them on?

"A. Right.

"Q. He has to be franchised in every location, right?

"A. Right."

* * *

"Q. Does each store location for a chain dealer have to be covered by a separate franchise agreement?

"A. No.

"Q. How is this noted in your franchise arrangement that it's a new location?

"A. We put it on our account sheets back at the factory."

* * *

"Q. Since you became president of Sylvania Home Entertainment, can you think of any dealer who has been denied the right to open a branch store anywhere in the United States?

"A. Yes.

"Q. Can you think of a specific one?

[421] "A. J. M. Fields.

"Q. Where is that?

"A. We sold J. M. Fields stores all the way from Miami up through New England. We don't sell all their stores.

"Q. What determines which stores you sell to?

"A. Whether we have enough coverage in that area.

"Q. Is there any policy that prohibits one Fields store from moving merchandise to another one and selling out of that store?

"A. Certainly. They would be selling without a franchise."

* * *

"Q. Let's take it more specifically. Is there anything in writing signed by the dealer that determines from what locations he can sell merchandise, that limits the number of stores that he can have anywhere?

"A. There is nothing that limits the number of stores that he can have, and he can have them anywhere at all, and if a dealer is going to open up a store or he is going to have—go into another market, he can go anywhere and open up another store. He comes to us and he says, "Can I have a franchise for that store?" And we say yes or no, depending on [422] whether or not we have coverage there or not. If we have been doing business with a dealer since 1962, or the guy we started with, we are not going to—just because this guy opens a store there, we are not going to put them side by side because he has a franchise in his other stores. We will not franchise a chain, per se.

"This program—I might add that this program from Day 1 to now, gets a little bit more complicated every year because in the beginning there was probably no problem: We never had any dealers.

"Q. I would assume the more dealers you get, the more this problem comes up?

"A. That's right."

* * *

"Q. I take it from your testimony that a dealer, Sylvania dealer, cannot display and sell merchandise from a location without being approved as a franchised dealer for that location?

"A. Right."

* * *

"Q. When you have a chain store operation—take Alco-Paramount again. He has a franchise store or stores, in Santa Clara County. Suppose they open a store in San Francisco, can they display [**423**] merchandise in San Francisco before that store is franchised by Batavia or approved by Batavia for franchise?

"A. No."

* * *

"Q. Based upon that testimony, it is my understanding that there is a policy against shipping merchandise from one franchised location to one that is not franchised and offering it for sale at the non-franchised location?

"A. Right.

"Q. Even though it is owned by the same people?

"A. Right."

* * *

"Q. Is there any policy of Sylvania one way or another about giving a dealer an exclusive territory to sell in?

"A. There is very definitely a policy.

"Q. What is this policy?

"A. We give nobody exclusive nothing.

"Q. This has been true since the inception, I take it?

"A. Right."

* * *

"Q. Have you franchised any dealers of any significance [**424**] in Sacramento since you became president of the division?

"A. No."

* * *

"Q. Are any efforts being made to put on new Sylvania dealers in the Sacramento area?

"A. Yes, the dealers we want.

"Q. What would determine which dealers you want and which you don't want in an area like Sacramento?

"A. Breuner's and Macy's.

"Q. What is the reason for this?

"A. I think marketing-wise, strategy-wise, I think that's the two accounts we need in there.

"Q. That is the type of need that you are talking about that you have to fill somewhere?

"A. Right.

"Q. Is this based upon your personal inspection of the area or reports or Mr. Hines' opinion, and Mr. Carroll, for that matter?

"A. It's a combination of all of them and my own personal—I will say my own personal strategy on this, yes. Not only this market, but any market.

"Q. Well, I take it in San Francisco you are not looking just for Breuner's or Macy's to sell?

"A. That's right.

"Q. You may take a pure television dealer, a music [**424-A**] store, or whatever, in San Francisco?

"A. Right.

"Q. Sacramento you have narrowed it down to furniture in Breuner's case or department stores, in Macy's?

"A. Right."

[Continued on next page; nothing omitted.]

[**425**] * * * "Q. As I understand it, Mr. Morgan, the next largest Sylvania dealer in Sacramento at the present time is considerably smaller in terms of dollar volume than Mr. Anderson; isn't that true?

"A. I am sure it is.

"Q. Is there any reason why Sacramento couldn't maintain another Keith Anderson operation in Sylvania products?

"A. It certainly could. I don't think there is another Keith Anderson, or any other type of operation like him in Sacramento. We have a formidible competitor in Sacramento by the name of White Front, who we do not sell and who we do not want to sell. Every market is different. There just isn't any dealer there that we know of. In fact, my own experience with the Sacramento market before in Philco, before we had

Keith Anderson, we never got beans out of it. You have Breuner's now. Macy's have a store up there. And you have Keith. And then you have your White Front. Aside from that, you have a couple of closed doors, is all I know of the place."

[**429**] * * * "Q. Now Mr. Anderson also advised you that Shahood had Sylvania merchandise in Sacramento, didn't he? He called you up on the phone?

"A. Yes.

"Q. Now, was it after Mr. Steiner had told you [**430**] merchandise was in Sacramento, or did Mr. Anderson give you the news first?

"A. No, he did not give me the news first. So it had to be after I knew about it.

"Q. Now what did Mr. Anderson say to you when he called?

"A. He didn't call me on that. He mentioned it and I says, 'Keith, I don't want to talk about it.'

"Q. Well, did you tell Mr. Anderson that Mr. Shahood wasn't franchised for Sacramento?

"A. No.

"Q. Did Mr. Anderson ask whether a franchise had been given for Sacramento?

"A. No.

"Q. Did he threaten to cancel his June order?

"A. No."

* * *

"Q. That was all that was said, Continental is here and they got merchandise, something to that effect?

"A. Right. Right. And we talked about some models and some styling, and he mentioned it, and I says, 'Keith, I don't want to talk about it.' I didn't talk about it.

"Q. Did Mr. Anderson tell you where Mr. Shahood's [431] store was in proximity to his?

"A. No.

"Q. You didn't know whether it was all the way across town or not?

"A. I had no idea where it was.

"Q. It didn't concern you?

"A. No.

"Q. Now did you have any other conversations with Mr. Anderson except the one in which Continental T.V. was mentioned? I mean in the context of time September, October?

"A. No."

* * *

"Q. All right. Now during the conversation with Anderson on the phone, did he make any complaint at all about Continental being at Sacramento?

"A. No, other than telli[illegible] me that he is selling merchandise down there, and that's it.

"Q. He wasn't happy about it, was he?

"A. No, he wasn't happy about it, but he didn't threaten me or anything else. He just told me Continental opened up down there."

* * *

[437] * * * "Q. Now I take it when you talked to Mr. Anderson, there was no reason to discuss

anything with him concerning a franchise, because you already had decided that Continental wouldn't be franchised in Sacramento. Is that fair to say?

"A. I hadn't made the decision whether he wouldn't or would have been. The question is that he just decided that he was going to do it. It's a matter of principle more than anything else. At the time, [438] the first thing, I was going to win the principle argument. No dealer is going to open up a store and say 'You are going to franchise me.'"

* * *

[439] * * * "Q. All right. Now you are familiar with the term 'elbow room policy'?

"A. Yes.

"Q. This is a sales policy, is it not, a franchising policy for dealers?

"A. It's a term to describe fewer dealers in competition.

"Q. In 1962 when you came with Sylvania was there an elbow room policy of any type?

"A. No.

"Q. Whose idea was this?

[440] "A. The term 'elbow room'?

"Q. The policy itself.

"A. The franchise?

"Q. Yes.

"A. It was an agrement that Mr. Theis and I have, this is the kind of program we were going to have, basically there was—I didn't feel,

neither did Bob, that there was any other type of program that you could have."

* * *

"Q. So from what source did the two of you develop this policy, if any source at all?

"A. Well, I think it evolved around one, determining first of all whether or not you should be in business, and what purpose do you serve or what can you serve and just what is your policy going to be and can you fulfill a need. If you can't, get the hell out of business. So we felt that we could fulfill a need and the need was to provide a line of merchandise to dealers that they would be proud to sell and we would be proud to sell and everybody could make a living at it, make the kind of profit they could make on it."

* * *

[441] * * * "Q. Now in 1962 as finally developed by Mr. Theis and yourself, what made up the elbow room policy? What factors, what determinations, and so forth?

"A. Well, first of all you would have to go back to 1962 whereby we had the distributor and branch organization and it took us through 1962 to close down the branches. I think we had some —Well, we had a branch in Chicago. The New York branch was already closed down. We had a branch out here in San Francisco. There was a question of closing down these branches. We had many open territories where we did not have

any distributors. And it meant closing out these weaker distributors and going direct in these markets which meant hiring men. And we started out, I guess, in 1962—I don't really know—I would say maybe twenty men.

"Q. All right. Once the elbow room policy or the direct dealer program was set up, what factors or guidelines were given to the district sales managers to implement this policy, this franchising policy? How were they to decide whether they should franchise one dealer or another?

"What were the factors in 1962?

[442] "A. The policy is simply a franchise —that is, here is a man in the territory and the whole thing is built on the premise that within— Let's talk about a one percent territory. You can get it down to a man's territory. Within this territory, a one percent territory, there are anywhere from 300 to 500 dealers, and, oh, by the trade papers, number of outlets as high as 750 outlets within a one percent theoretical territory.

"Now if we are going to put one man in there, obviously he physically can only call on X number of people and he obviously has to get the size of an account that can support his call. It is strictly an economical factor. He is competing with a distributor in that market. The distributor in that market is selling 250 of those 300 dealers, and he is trying to sell the other 50 and it is just a question of going up and down the street and selling anybody that wants to buy your line.

"So our man— We said, one, he has got to go in there and he has to perform all the functions of the distributor with the exception of the warehousing and the shipping, which we do, and that he can only call on so many dealers and to pick the finest dealers, compatible dealers, so that they [**443**] will tie in with our minds of merchandising and that we can fulfill the need, a need for profit in this industry, and this is what we do.

"Q. Taking those dealers, the physical proximity of stores enter into it, how close one dealer is to another?

"A. Not necessarily. I think it's all a very subjective thing. For example, compatibility enters into it. Let's say a furniture store is not selling the same type of customer as the TV specialty appliance store. The music store is not selling the same customer. The department store generally has their own people.

"Q. By compatibility, you mean what type of customers the store is dealing with for one thing?

"A. Right.

"Q. Whether they are serving separate parts of the buying public?

"A. Right.

"Q. You said that physical proximity would not be a factor?

"A. You said it's a very subjective thing. In some cases it would be a physical—it could be a physical proximity.

"Q. Is there any rule in this policy that says [**444**] that you can't franchise dealers directly

next to one another, two of them, as Sylvania dealers, for example?

"A. No rule says we can't, no.

"Q. Do you know any occasion where that has happened, one door to the next door, two Sylvania dealers?

"A. Sure.

"Q. All right. How about the volume that a dealer can provide, is this a factor in deciding whether you should franchise him or not?

"A. Certainly. And here it isn't a question of the big dealer, it's whether the guy is a growing dealer. We have many dealers that we start out where—I can think of a couple of dealers that were practically, you might call, service men, that today have beautiful stores and that have built their organization and do a hundred and fifty, $200,000 with us.

"Q. You are looking for growth potential?

"A. Right.

"Q. Ability to sell?

"A. Yes. And businessmen, pay their bills."

* * *

[**445**] "Q. The credit department, as I understand, has the power to place a credit hold on any particular order for a dealer at any point in time if they deem it advisable; is that true?

"A. Right. They set the credit guideline on a dealer and they determine whether the guy is within his credit limit and whether he is current in his payments, or whether they have to hold an order.

"Q. A credit hold could be of a temporary nature until he paid down the account, right?

"A. Right.

"Q. Or it could be because he hasn't been paying bills, right?

"A. Right."

* * *

"Q. Do you make it a practice, or have you in the past, Mr. Morgan, to review any of your dealers' financial statements or Dun and Bradstreet reports, or whatever?

"A. No.

"Q. This is a credit job, right?

"A. Right. Those guys are professionals. That's their job."

[446] * * * "Q. Now is it Sylvania's policy that the franchising of a branch dealer, again like Alco-Paramount, in San Francisco, would have to be approved by the existing Sylvania dealers in San Francisco?

"A. No.

"Q. Is there any policy of notification to existing dealers that a new franchised dealer is coming in?

"A. Yes. We tell them we have another dealer.

"Q. What is the reason for this?

"A. Just to tell them.

"Q. Suppose they object to them?

"A. Suppose they object? We run our own business.

"Q. This wouldn't affect your thinking?

"A. No, absolutely not. And, incidentally, they **[447]** always object.

"Q. I would assume that.

"A. Right."

* * *

"Q. I would assume the more dealers you get, the more this problem comes up?

"A. That's right.

"Q. Is there any other manufacturer, to your knowledge, other than Magnavox which has a similar policy as the elbow room policy?

"A. In our business it's Magnavox and ours, I would say. There's other people who try this sort of thing.

"Q. But those are the two that you can think of that are more nearly the same in this field?

"A. Yes. For example in the range field, Caloric ranges do the same thing in the range field, but in our business it's Magnavox."

* * *

[454] * * * "Q. The allocation then was based on merchandise actually shipped through August 31st, 1965?

"A. Right.

"Q. Not ordered, shipped?

"A. Shipped. And we had to have a figure to start from.

"Q. What Continental had actually received for the previous twelve months was the figure that you used?

"A. Eight months.

"Q. Oh, eight months. I though you said September through August.

"A. No.

"Q. I see. It is just for the year 1965 then?

"A. That's right.

"Q. January 1st to August 31st?

"A. It was eight months.

"Q. The amount that was shipped, based on your figures, gave Continental some 544 sets?

"A. Right.

"Q. This did not include any credit for the August 27th order?

[455] "A. Right.

"Q. Or any part of the July 3rd order that had not been sent yet?

"A. Right. This applied to everybody."

* * *

"Q. Now did you place a hold on the August 27th order a sales hold, I mean?

"A. Let's say when this thing hit, it really started about August the 20th. By September the 1st—I mean, we knew that this thing was right across the country, it just didn't happen overnight. It took a couple of days. And we not only had—this order was just one of many. We had franchises from department stores. We had a whole desk of orders this high, from people all over the country. And we had to make a decision that we would send out a wire and we would not franchise any of these dealers; we are going

to take all the merchandise that we can make between now and the end of the year and we are going to give it to our existing dealers because we can't even supply them, and we certainly are not going to put on new dealers, and we are going to come up with a formula to try to treat everybody fairly.

"So in doing this, we used the September 1st **[456]** figures. All I did was figure out how many sets we could make until the end of the year, and then come up with a rule of thumb that would make sense. And with the number of sets that we were going to make between now and the end of the year, I correlated it to roughly what the dealers, all dealers had bought in the first eight months, so that I could say, 'For the first eight months this is what you bought. This is what we can give you for the last four months. And you will see that it's a pretty good allocation. We are not selling to our employees. We are not selling any new dealers. We are giving all the merchandise to you.'

"And this is where I had to have an eight months' figure.

"Now there was a lot of orders that were, let's say, not filled completely. There was a lot of orders that come in that last week of August, even though they were credit approved and everything else, that could not possibly go through that order department, could not have gone through the mechanical process of writing up the

orders and getting them over to the warehouse, and so forth. If we were to try to add these things, we would have been working **[457]** another four weeks, trying to figure out an allocation because we couldn't get the data together."
* * *

Testimony of Donald E. Carroll

[466] * * * Q. When you began in 1963, did you franchise the dealers that existed in the territory? A. Those who were already franchised?

Q. Yes, sir. A. Did I refranchise them?

Q. Yes, sir. A. No, sir.

Q. But I assume that you solicited new potential dealers in San Francisco in 1963, correct? A. Yes.

Q. Is that right, sir? A. That is correct.

Q. All right. Now, in 1963 Sylvania had certain sales policies that you were aware of, is that right, Mr. Carroll? A. That is correct.

Q. And Sylvania also produced a sales and operational manual for use of yourself and your District Sales Managers, is that correct? A. Correct.

Q. Let me show you a reproduction of such a manual. You can ignore the tabs. I have placed those there. Without reading the manual, can you just glance at it enough to tell me whether you have seen such a manual before? **[467]** A. Yes, sir, I have.

Q. Is it not a fact, Mr. Carroll, that is a copy of a manual which Sylvania asked its District Managers

to use in 1963, 1964 and 1965? A. I wouldn't be able to tell these years this was the manual. This is a manual that we used. We up-date our manual from year to year. I am not sure as a matter of record which manual was used.

Q. All right. So, was such a manual used in 1963? A. It is my recollection, sir, that the manual was given to me not on coming to Sylvania but at a later date. So I would think it probably wasn't until '64.

Q. I would like to show you Exhibit B which is the *forward* page from this manual. Sometime in 1964 do you recall that the manual was in use, sir? A. By my memory I would say so.

Q. All right. In the third from the last paragraph of the forward Exhibit B it states:

"The complete understanding of the contents of this manual is essential. It is to be used not only as a reference manual as to forms and procedures but as an educational and operational manual."

[468] Was that your understanding, sir, of that document? A. Yes.

Q. It goes on to say:

"Read it, study it, use it often. Under no circumstances allow it to be loaned or lost."

Now, this manual in general outlines the S.L.D. program. You were aware of that, of course? A. Yes, sir.

Q. Let me show you Exhibit F which is a two-page package from the manual we have been talking about, entitled "Sales—Section 2—S.L.D. Program."

Now, the first paragraph says, Mr. Carroll:

"Sylvania home entertainment products are only sold through franchised dealers.

"The franchise is not a meaningless paper that puts the dealer in a profit squeeze with weak competitors."

Skipping a sentence.

"The franchise contains a good comfortable selling climate by creating Elbow Room in a sensible territory based on market and dealer potential. Same brand competition is eliminated."

Let me stop there a moment and ask you: Wasn't that your understanding of the S.L.D. program in 1964? A. May I give other than a yes or no answer to that? **[469]** I think it requires a little clarification at this point.

Q. All right, sir. A. On that point, you skipped a very important sentence in that paragraph to the understanding of the S.L.D.

Q. Let me back up a moment and read the entire paragraph. I will start at the beginning.

"The franchise is not a meaningless piece of paper that puts the dealer in a profitable squeeze with weak competitors. The franchise is based on stability of direct factory relationship with a strong, straightforward program of policy and understanding. The franchise contains a good profitable selling climate by creating Elbow Room in a sensible territory based on market and dealer potential. The same brand competition is eliminated."

Now, wasn't that your understanding of the S.L.D. program in 1964, sir? A. With the exception of the terminology of the last sentence.

Q. "Same brand competition is eliminated."? You don't agree with that? A. That is true. I do not agree with that.

Q. You do admit that this practice outlined was contained in the operational manual, correct? A. Right.

[470] Q. And this manual you do admit was utilized by the District Sales Managers under your supervision? A. Correct.

Q. Is it not a fact, Mr. Carroll, that your District Sales Managers were in effect told by this manual that this is the S.L.D. program, this paragraph that we have read? A. This is a guide to the S.L.D. program?

Q. Yes, sir. Is that right? A. A guide to the S.L.D. program.

Q. Is that correct? A. That is correct.

Q. Turning to page 2 of the document you have before you, sir, Exhibit F, first sentence.

"Straight line distribution is Sylvania's concept of the proper way to distribute and market products in the metropolitan markets. It incorporates the best thinking, most up to date ideas, finest communications between factory and dealer yet devised. It is the industry's finest factory direct program."

This paragraph encompasses some of the things that your salesmen were told to [tell] prospective dealers, isn't that right? A. Correct.

Q. Down to the fourth paragraph, Mr. Carroll:

"S.L.D. also eliminates same brand competition. **[471]** Sylvania wants fewer dealers and quality rather than quantity. By not overfinancing, straight line distribution eliminates vicious price cutting and establishes suggested prices. That enables each dealer to make a fair profit and each customer to receive an outstanding value."

Now, the information contained in that paragraph I have just read to you was also information which your salesmen were told to represent to prospective dealers? A. As a guide. Again the first sentence is not correctly worded and it was so stated.

Q. That is your personal opinion at that time. A. That was my practice.

Q. We will get to your practice. I am just asking you whether or not the information contained in this paragraph was used by your salesmen in 1964 and 1965 as representations of company policy when they contacted prospective dealers? A. Not verbatim.

Q. It is your testimony here today, sir, that your salesmen did not represent to dealers that same brand competition would be reduced or eliminated? A. That is different. This says eliminated. It doesn't say reduced. I am testifying, if I may, that our men including myself never said to our dealers or represented to **[471-A]** our dealers that that same brand competition was eliminated.

[Continued on next page. Nothing omitted.]

[472] Q. Is it your testimony, sir, that none of your salesmen ever represented that same brand com-

petition is eliminated, to any dealer? A. I would never, I would not say never, I'm saying that it was our practice not to do that and it was my counsel to them not to do it.

Q. And you told Mr. French that, did you not, sir? A. Told him not to say it was eliminated?

Q. Yes. A. Yes, I did.

Q. And you in fact, in substance, told Mr. French "when you contact a prospective dealer you are not to tell him that our program eliminates same brand competition;" is that a correct statement? A. I'm sure I did.

Q. And you're sure you did that after you got here in 1963? A. I have done it all my life, so I'm—I have been 35 years in business, so I'm sure I did.

Q. But you haven't been 35 years with the Sylvania Company, have you? A. No, but I have been 35 years in servicing retail dealers.

Q. So generally what you're telling me is your basic understanding of the industry practice, isn't that right? **[473]** A. That is true.

Q. And it is industry practice according to your opinion at the present time that manufacturers do not tell dealers that they are going to eliminate same brand competition; that's what you're saying, isn't it? A. That is my understanding.

Q. The next paragraph down, paragraph 5, Mr. Carroll, in this document, Exhibit F, says:

"Elbow Room gives every Sylvania dealer a geographic area in which to sell our Sylvania products."

Your salesmen represented that sentence to prospects, did they not? A. Again, not out of context and not verbatim for that one sentence.

Q. I'm not saying that they read this manual to your dealers, in substance, didn't they represent that concept to them in 1964? A. Not in substance, no.

Q. Did you tell Mr. French not to represent that this was the meaning of Elbow Room? A. In the same way I told him that he cannot say it eliminates. I would be glad to enlarge on that if you would like me to.

* * *

[475] * * * Q. All right, sir.

Paragraph 5 in the manual goes on to say:

> "S.L.D. does not promiscuously franchise dealers without first studying their size, location and effect on the market, as well as other Sylvania dealers in the area. By franchising dealers by territory Sylvania becomes an important profit factor to its dealers. This creates good relationship and proper respect between factory and dealer."

Is it also your testimony you told Mr. French not to represent the substance of that paragraph to dealers? **[476]** A. To the contrary.

Q. Oh, you told him he should represent that paragraph, is that correct? A. That's correct.

Q. I would like to show you another two pages taken from your sales and operations manual, Exhibit C, sir. Will you look at the second page of that, please, near the bottom.

Your manual states:

> "How much Elbow Room is there really in our program. It usually following industry statistics as evidence of our limited number of dealer approach. And notes: we give super elbow room while elbow room is adequate to make the program a success."

Did you tell Mr. French in 1964 not to represent the substance of that paragraph to prospective dealers? A. No, I did not tell him not to represent. We are getting into a couple of negative negatives there. Shall I clarify that? Would you clarify that for me?

The Court: You may clarify it, if you wish.

The Witness: I represented through—we represented as a team the Elbow Room concept as it is put forth here. That's a positive.

Q. You represented as a team the Elbow Room policies as described on Exhibit, is it C, before you? A. Says B on the top. Is C on the righthand? Yes.

[477] Q. Right. A. Yes sir.

Q. Fine. Now, of course, the Maguire plan of financing was presented to dealers through salesmen, was it not, in 1964-1965? A. Maguire forms were presented to dealers for signature, yes.

Q. Mr. Carroll, how was a dealer going to know what the Maguire program was if he didn't talk to the Sylvania salesman about the program? A. True, the forms were presented by our salesmen.

Q. And the basic terms were outlined by the salesmen, sir? A. The basic terms, correct.

* * *

[484] * * * Q. Now, did the physical proximity of a prospective dealer to the other franchised Sylvania dealers in the same area have any bearing on your decision? A. Yes.

Q. Would you explain that, please? A. Yes, under the Elbow Room philosophy the basic concept of growing the Sylvania business with our dealers is that within a given area there is enough potential Sylvania business for each of the dealers we franchise to prosper and grow.

Q. And it is not in Sylvania's interest to franchise more dealers than in your judgment could all profit from selling Sylvania in the same market area? A. That's correct.

Q. And you as Regional Sales Manager would make a decision of that type? A. With my District Manager.

Q. In consultation with your District Salesmen? A. And with the reports that are given to us.

Q. What reports? A. The P.I.A. County penetration reports as primary guide. We also get utility reports and obviously the day to day reports of the District Manager observing the dynamics of change in his given district.

[485] Q. So I take it that in 1963 to 1965 you personally felt that it was in your company's best interests to keep the dealers in each market area within the concept of the Elbow Room policy? A. Correct.

Q. And that was company policy throughout those years, correct? A. Correct.

* * *

[492] * * * Q. Didn't you in fact become indoctrinated into the elbow room policy at a training program in Batavia? A. Yes, I did.

Q. That was after you were an employee, was it not? A. That wasn't the first—you asked me when was the first.

Q. All right. And an inherent part of this elbow room policy was and is what is called Sylvania's ability to give predictable profit to dealers in any given territory, isn't that correct? A. Fair return, correct.

Q. And elbow room in that sense means having fewer dealers in competition with one another, correct? A. Correct.

Q. In other words, the more dealers you have in competition the thinner the slice of pie is for each dealer? A. That's true.

* * *

[497] * * * Q. Do you have any personal knowledge as to how these districts, how these salesmen's districts were picked geographically or determined? A. Yes, sir.

Q. All right. How was that done? A. It's done on an approximate basis by Sylvania management with the tools of the electronic industry reports; trying to give each district manager close to one percent of the United States to service as far as the potential of the district is concerned.

Q. May I stop you there just a moment. So that Mr. French's territory would, under this determination, approximate a geographic area in which approximately one percent of the total industry sales

had been made during some point in time? A. Correct.

Q. And Mr. Hines in the Sacramento territory, northern territories, the same would be true for him, correct? A. Correct. Give or take a quarter or a half of percent.

Q. Okay. And your company as a policy tries to cover each of these large territories with franchised dealers utilizing the elbow room policy, is that correct? [498] A. That's correct.

Q. That's your personal practice, isn't it, sir? A. That's correct.

Q. You recommend it to your salesmen? A. That's correct.

Q. Now under the elbow room policy, Mr. Carroll, would you normally franchise a prospective dealer who was located in close physical proximity to an existing dealer? A. What do you mean by "normally"? Would we ever, or do irregularly?

Q. I will rephrase it if you don't understand the question. Under your elbow room policy as you understood it in 1964 and 1965, would you approve a prospective dealer who wanted to open a store in close physical proximity with an existing dealer? A. I could, depending on all the factors. We wouldn't seek out such an arrangement.

Q. It would be rather unusual for you to do so in those years, would it not? A. Yes. There were fewer of those cases than those that were separated.

* * *

[500] * * * Mr. Miller: Q. As a matter of fact, it wasn't common to find a Sylvania dealer in 1964

or 1965, anywhere in your region, sir, who sold merchandise below the company's suggested pricing? A. It was uncommon.

Q. Uncommon? A. Correct.

Q. I'd like to talk to you just a moment about the policies as you understood them in 1964, 1965, respecting the franchising of branches. You were aware, sir, in those years that one or more dealers in your region did have branch stores? A. Correct.

Q. Now, if a dealer at the time he is initially franchised has a single location but thereafter opens another location, he, as I understand it, has to get pre-approval from his district salesman, if it is in his own territory, or the salesman in whichever territory he plans to open the branch, correct? A. Correct.

Q. He must do this before he would be allowed a franchise, is this not so? A. That is correct.

[501] Q. Not only that, however, also your approval is necessary where the branch is going to be located in another salesman's territory? A. That's correct.

Q. And that was the policy in '64 and '65? A. Correct.

Q. Now as I understand it further, there was no written franchise form, such as Exhibit 3 here, signed for each new branch opening during those years, is that correct? A. That is correct.

Q. As a matter of fact, verbal notification only was given to the dealer that this next branch was an approved location by Sylvania, isn't that so? A. Given to the dealer or to the Sylvania factory?

Q. To the dealer, sir. A. To the dealer—well, he would be put on the mailing list; and therefore would get the notification in that way, but there was no form sent to the dealer saying he was franchised, to my knowledge, to my memory.

Q. How did the dealer know he was franchised in 1964, 1965? A. His district sales manager from Sylvania would tell him.

Q. Verbally? **[501-A]** A. Correct.

Q. And that was a consistent policy through 1965 also, was it not? A. I believe so.

(Continued on next page.)

[502] Q. Some notification was also sent to Batavia, New York, the factory; you have already alluded to that. A. Correct.

Q. And that was prepared in some manner by the district salesman involved? A. That is correct.

Q. Were you given some written notification yourself? A. Not written. Copy of his notification to Batavia.

Q. Would this be in a form of a memo of some kind to the factory? A. Well, it should have been in the form of dealer—I forget the terminology of the form—but we had a dealer application form, dealer information form. It could have been just a memo.

Q. Let me show you Exhibit 20-B which is what you are talking about. Dealer information form. A. Correct.

Q. Mr. Carroll, are you telling me that such a form was filled out for every existing dealer? A. No.

Q. As a matter of fact, that form 20-B was filled out originally after the initial franchise whether the original franchise was for one or more locations, correct? **[503]** A. Correct.

Q. Thereafter, it was verbal notification to the district salesman and verbal notification by him to you that the franchise for some specific location was requested, right? A. That's the first step.

Q. And then I take it the second step is that you in consultation with the salesman or salesmen involved would make a value judgment? A. Correct.

Q. And among you, you would decide whether a franchise should be granted in that particular location? A. Correct.

Q. And thereafter, that decision, either yes or no, it would be relayed to the dealer verbally by the salesman? A. Correct.

Q. Now, after Batavia, New York is notified, I assume that when you say Batavia, New York is notified—by the way, you mean the sales division in Batavia? A. Correct.

Q. Headed by Mr. Morgan as vice president, Mr. Steiner as national salesman and yourself, correct? A. I wasn't in Batavia.

Q. I understand. But on the chain of authority. A. Yes.

[504] Q. Mr. Steiner was in Batavia? A. Yes, correct.

Q. Mr. Morgan was there? A. Correct.

Q. During 1964 and 1965, sir, is it a fact that Mr. Steiner was your immediate superior? A. That is correct.

Q. Now, had you ever approved a franchise location in your region but to have Mr. Steiner and Mr. Morgan supersede your judgment and disapprove it? A. No.

Q. Never happened, has it? A. Not to me. Was that the question, did I?

Q. Yes, sir. A. Thank you.

Q. Now, this arrangement whereby if a branch is moving from one territory to another territory, that is, an original franchise store in Mr. French's territory, for example, and the store owner opens a branch store in Mr. Hines' territory, for example, it is necessary for Mr. Hines to approve that new location, correct? That is my understanding of it. A. Yes.

Q. Now, that is a verbal or tacitly agreed to **[505]** policy among salesmen and yourself, is it not? A. Well, it's part of the district sales manager's job description that he's responsible to select and build the territory. So it is more than just verbal.

Q. It is not contained anywhere in the sales manual, is it, sir? A. If it isn't, sir, it certainly should be in there. Job descriptions I have read it is contained.

Q. I would like to refer the witness to page 178 of his deposition commencing at line 11.

"Q. Well, is it fair to say, Mr. Carroll, that your policy was to attempt to have dealers expand into areas that you needed coverage in more so than the dealer thought that he wanted to go into?

"A. Definitely. Our policy is to franchise in areas where we feel we need coverage. That is true.

"Q. Did Mr. Hines have to give approval to Continental opening a Sylvania store in Sacramento before it was opened?

"A. Did he have to give approval?

"Q. Was his approval required?

"A. Obviously not, because Continental opened a store there.

"Q. Under your policy, was it supposed to be **[506]** approved and give his approval before Sylvania merchandise was sold in Sacramento?

"A. Under our verbally and tacitly agreed upon procedure but not policy. There is no written policy about that."

A. Right. I thought we were talking about franchise. That questioning was talking about selling of the merchandise, whether it was franchised or not, as I understood it.

Q. So you are saying now that it is a company policy, sir, that although the salesmen whose territories are involved must approve if a branch is going in those territories? A. Correct. Excuse me. Approve if a branch is to be franchised?

Q. By Sylvania. Correct? A. Correct.

* * *

[511] Q. And did you find that Continental TV at that time met all of your standards? A. Correct.

Q. Did you find that Continental TV management was growth oriented? A. Correct.

Q. Did they seem to have adequate financial resources? A. As far as our initial size of payment was concerned our credit department said so.

Q. All right. As a matter of fact, Continental agreed to adhere to the advertising policies, correct? A. Correct.

Q. And also they promised to adhere to the Elbow Room policy? A. I can't say directly to that, because they really have nothing to do with the Elbow Room policy. That is the unilateral policy on Sylvania's side. We don't ask the dealer to adhere to the Elbow Room policy.

Q. You ask the dealer initially, Mr. Carroll, to seek prior approval before he sells Sylvania merchandise at other than a franchised approved location? A. That is correct.

Q. And Mr. Shahood gave such a promise on behalf of Continental TV, did he not? [**512**] A. I assume he did.

Q. All right. Now, from time to time is it not a fact that you and Mr. Shahood on behalf of Continental TV had discussions about possible expansion of Continental TV into other trade areas? A. That is correct.

Q. Didn't you feel that it was your company's role and particularly your role personally to try to channel Continental's expansion into areas that you and your company needed more penetration in? A. Provided that it was suitable for him, correct.

Q. And you also discussed these things with Mr. French on a continuous basis? A. Correct.

Q. Now, were you aware, of course, after the San Leandro and the Stevens Creek stores were opened that later in 1964 San Francisco became a location for Continental TV? A. Correct.

Q. Did you have any objection to that location? A. Negative.

Q. You discussed it with Mr. French, did you? A. Correct.

Q. And Mr. Shahood? A. Correct.

Q. Now, Mr. Hallday was not in the area as yet at the [**513**] time that the San Francisco store was opened? A. I think he was.

Q. Did you discuss it with Mr. Hallday? A. I did.

Q. That San Francisco Continental store, did it fit with your company's policy respecting Elbow Room? A. It did.

Q. It was located on Geary Street, correct? A. Right.

Q. So I take it it is fair to say that your company needed greater penetration in San Francisco at the time that Continental store was approved? A. Yes. Correct.

Q. I would further say it is fair to remark that particularly on Geary Street and its surrounding market area you needed particular help? A. We had no location in that area.

Q. And you told Mr. Shahood that, didn't you? A. Correct.

Q. All right. Also in the fall of 1964 you corresponded with Mrs. Barnes concerning Continental TV. Let me show you Exhibit I, sir, and ask you to just review that to yourself for a moment. Have you finished? [**514**] A. Yes, I have.

Q. Now, you wrote to Mrs. Barnes and she was the Credit Supervisor at that time? A. Correct.

Q. It is dated September 12, 1964.

"Confirming our conversation on subject, it is my considered opinion that Sylvania's investment in time, money and service to subject will pay off far better than most accounts in which we invest.

"George Shahood, President of subject has brought our program from A to Z and has transferred his retailing efforts (bordering on genius) from Muntz to Sylvania. The results to date speak for themselves.

"From a sales department standpoint this is an ideal account for our Maguire plant. The reliable up to the minute control of every piece of merchandise and the regular payoffs as sold plus the sound financial condition of the personal guarantor, added to, the fact that each of his branches are made to show a profit on its own, would justify credit extension up to any needs based on actual sales. By using Maguire for all of his purchases you will have an accurate record from payoffs as to total Sylvania sales and therefore will be able to counsel with George if he seems to be buying more than is logical from his needs [515] standpoint.

"Thanks for your cooperation. This is only the beginning of big volume accounts and we will work very closely with you to get maximum results with minimum risk.

"Don Carroll."

You sent copies of this to Mr. Lockhart who is the Controller of Sylvania and to Mr. Callahan, is that correct? A. Yes.

Q. Mr. Callahan who is the National Credit Manager, correct, sir? A. Correct.

* * *

[520] * * * Now, how many people in the trade area would you say there are in greater Sacramento? A. How many people?

Q. Yes, sir. A. Talking about 65 now or 70?

Q. Well, let's take 1964-1965. A. In round figures, a half million people.

Q. Now, in considering whether a market area is attractive from the standpoint of your company, is the total industry amount of sales, say, in some period of time, is that a criteria that is considered? A. Correct.

Q. Is that very important in judging the need for dealers in a territory? A. It's an important factor.

Q. Now, Mr. Carroll, isn't it a fact that in 1965 the market area in Sacramento had been reported as having the highest saturation of colored TV owners of any trade area in California? A. Industry saturation.

Q. Industry saturation, yes. A. Yes.

Q. I think Los Angeles then passed it at some later time, but at that time that was so, wasn't it? [521] A. Correct.

Q. Do you recall how high the saturation was in 1965 on industry total basis? A. No.

Q. 20 percent sound— A. Possible.

Q. —possible? Does it refresh you in any way? A. It sounds correct, yes. It seems to me at that point the national average was well under that.

Q. That meant that—well, let me ask you, what does that 20 percent figure mean? A. That meant that 20 out of every hundred homes in Sacramento had a colored television set.

Q. O.K. Now, prior to September of 1965 you were aware of the dealer who did business under the name of Handy Andy in Sacramento? A. Prior to 1965?

Q. Prior to September, 1965. A. That's correct.

Q. When did you first learn of Keith Anderson and/or Handy Andy in Sacramento? A. In my first year in California, 1960.

Q. All right. Mr. Anderson, of course, wasn't a Sylvania dealer in 1960, was he? [**522**] A. I wouldn't know, I wasn't with Sylvania at the time, counsel.

Q. All right. Did you call on Handy Andy yourself in those days? A. Again as a supervisor with my District man for Stromberg Carlson.

Q. And with your sales personnel did you attempt to solicit orders from Mr. Anderson's store? A. With my District Manager, yes sir.

Q. Is it a fair statement to say that from about 1960 until you came with Sylvania in 1963 that you periodically called on Mr. Anderson's store? A. Correct.

Q. In 1963 you came to work for Sylvania. Did you learn sometime soon thereafter that Mr. Anderson became a Sylvania dealer? A. Negative. He

was a Sylvania before I came to Sylvania in '63, but I did not know which year he joined us.

* * *

[**523**] * * * Q. Mr. Carroll, did you learn at some time after you started with Sylvania that Keith Anderson also owned an interest in a distributorship handling Sylvania merchandise in Fresno? A. I did.

Q. You have known that since about 1963? A. I did.

Q. Do you know of any other dealer in California that has an interest in a distributorship? A. I don't know of any.

Q. I am talking about Sylvania dealers, of course. A. I don't know of any.

Q. Do you know whether or not the Sylvania distributor people are requested or instructed to use the elbow room system as they franchise in turn retail dealers? A. I don't—I am not conversant with the wholesale distribution policy.

Q. Now is it not a fact that Handy-Andy in Sacramento was the largest volume Sylvania dealer in Mr. Hines' territory in 1963? A. That is correct.

Q. The next largest, probably two, one in Reno and one in Stockton; would you say that's a fair statement? [**524**] A. Correct.

Q. And his status as the largest Sylvania dealer in Mr. Hines' territory has remained constant from 1963 to the present time, has it not? A. That's correct.

Q. Now in 1963, from the information we received from your company in written interrogatories under oath, Mr. Carroll, it appeared that there were 7 dealers in the Sacramento County area. Would that accord with your recollection, sir? A. What year?

Q. 1963. A. I can't read it from here. Would you give me the dealer's name?

Q. Handy-Andy, J. W. Brewer, Tri-State Sales, North American Appliance, North Sacramento T.V., Allied Builders Credit and Bank Furniture. A. J. W. Brewer is not a dealer. He is a customer, but not a dealer, not a retailer.

Q. Who was that, sir? A. J. W. Brewer.

Q. Yes, sir. As a matter of fact, the purchases by Brewer in 1964 and 1965, to your knowledge were sold outside the Sacramento County area, isn't that true? [525] A. Not exclusively. They were sold to motels and hotels.

Q. Yes. But what I am saying is that his customers were located outside Sacramento. A. Some were and some weren't.

Q. The interrogatories indicate, sir, that, for instance, in 1964, the entire purchase shipped to Brewer was sold from outlets outside the city of Sacramento, specifically Reno, Nevada and Bijou, California. Does that accord with your recollection? A. I wouldn't dispute that. Really I am not in any position to know. My first response was it wasn't necessarily so.

Q. All right, sir. For instance, in 1964, Mr. Anderson's firm in Sacramento purchased almost a quarter of a million dollars wholesale with your company.

A. I am sorry. I didn't respond—you interrupted me when I said about Brewer. One of the other seven, Bank Furniture, that has to be a bank who is flooring for one of the other dealers. I have no recollection of such a dealer.

Q. Bank Furniture? A. And Allied Builders Credit is a fin[illegible]ce company, not a dealer.

Q. The interrogatories under oath indicated that [526] amount of purchases by those entities in 1963, and you say you don't have a recollection? A. They were not retailers—well, Allied Builders Credit, ABC, is a finance company a la J. P. Maguire Company, to bring it to your term of reference.

Q. So it was really—all right, sir. So Allied Builders Credit and Bank Furniture were the two you mentioned? A. Right.

Q. These were not retailers. So that we had five retail outlets in Sacramento in 1963, correct? A. '63?

Q. Yes, sir, A. Okay.

Q. In 1964 a number of outlets went down to really three; Handy-Andy; J. W. Brewer and Tri-State Sales commenced that year, correct? A. Correct.

Q. As I say, Handy-Andy purchased about a quarter of a million dollars of Sylvania products, Brewer purchased about $34,000, but sold it outside—from outlets at least outside the county of Sacramento. And also in 1964, the interrogatories indicate, Mr. Carroll, that the Brewer Company only purchased one color TV set. You have no recollection? [527] A. No exception to that.

Q. In 1965, the situation is the same as to the indicated number of dealers, that is, Handy Andy, J. W. Brewer, Tri-State Sales, all appear as dealers. Handy Andy purchases almost $1,000,000 wholesale in merchandise. J. W. Brewer purchases $11,000 for the year; again, one color TV set, and again, shipped to outlets outside of the City and County of Sacramento. Tri-State, the third indicated dealer, purchased $327 for the year. No color TV sets. Now you have no information that these figures and these indicated dealers are inaccurately displayed here, do you? A. No.

Q. All right, sir. Now in 1966, although we don't have the money values of purchases, it is true, is it not, that in June of 1966, J. W. Brewer terminated as a Sylvania dealer? A. My memory doesn't have any termination—as I said earlier, counsel, he was not a dealer, not a retailer. He was a customer who handled sales to motels and so forth; but a consumer would not go into J. W. Brewer and buy a set. So my answer is I don't believe that he terminated, [528] but he may have.

Q. All right. Tri-State Sales—do you recall that they terminated in fact, didn't purchase any product in 1966? A. Correct.

Q. So that in 1966, Mr. Keith Anderson of Handy Andy had a virtual monopoly in Sylvania products in the City and County of Sacramento, is that not right? A. We are omitting one channel distribution, which I don't know the years on, but it certainly was in that period from '63 to '66, and that was a branch of Sherman Clay.

Q. Sherman Clay. Do you have any information as to why Sherman Clay was not shown on the answers to interrogatories?

Mr. Popofsky: Your Honor, those are prepared by counsel in cooperation with the client. I think the explanation is that the question called for shipments to the main offices in Sacramento and the question, therefore, simply didn't call for Sherman and Clay, which was shipped to main offices elsewhere.

The Court: Perhaps Mr. Carroll is familiar with Sherman Clay.

The Witness: Yes. My counsel just answered what I would have answered.

[529] Mr. Miller: Q. All right. So you think there was a branch of Sherman Clay franchised for Sylvania products in Sacramento in 1966? A. Again, my memory can't tell you which years, but certainly when Sherman Clay was a franchised dealer, the Sacramento branch was a franchised branch.

Q. You don't recall the year? A. Not from memory, but it is a matter of record.

Q. Mr. Carroll, do you recall the amount of product in dollar amount that was inventoried, displayed and sold from the Sherman Clay branch in Sacramento for any given year? A. The only one of those three things that you are asking me that I would have—would have been given any information on was a display. There was no report by branch from Sherman Clay to us as to how much was sold in that branch.

Q. So you wouldn't know? A. I wouldn't know.

Q. What kind of a store would you describe Sherman Clay's branch in Sacramento as being? A. It is a music store with television and stereo departments.

Q. So it is not—I am sorry. Are you through? A. Pianos and organs and instruments.

[530] Q. So it is not a pure television and appliance store such Handy Andy? A. It is not.

Q. It is not a discount store, is it? A. Negative.

Q. Do you have any recollection as to that particular branch of Sherman Clay as to their volume of sales for any given year? A. I wouldn't have that information available to me.

Q. Besides Sherman Clay for some year in here, is it not true that Handy Andy was the only other dealer handling Sylvania products in volume in the Sacramento County area? A. That's correct.

Q. Is it not a fact, sir, that— A. May I back up on that question?

Q. Yes, sir. A. Sacramento County?

Q. That's right. A. You added the word "area." There are surrounding areas in which there are other dealers.

Q. Well, I think you had a dealer down in Roseville, for instance, did you not? [531] A. North of Sacramento.

Q. Roseville is north. A. You see, the Sacramento papers and everything covers all of that area, so I had to back up on that response.

Q. That's Lenzis? A. Correct.

Q. How much did Lenzis do in 1966, in purchases? A. '66?

Q. Uh huh. A. Again, you are asking me to remember years. At this point I am not certain—he was about a $75,000 a year account at dealer cost, which would translate into a little over $100,000 at retail.

Q. I refer you to page 59 to refresh your recollection.

Mr. Popofsky: What page, counsel, please?

Mr. Miller: 59, line 5.

"Q. There is a dealer near Roseville who handles Sylvania products, or had been?

"A. Yes.

"Q. Is this Lenzis?

"A. Lenzis, yes.

"Q. Do you recall what their volume was in 1966, approximately?

"A. Sixty.

[532] "Q. $60,000?

"A. An estimate."

Does that help refresh your recollection that they did about $60,000? A. That was a '67 deposition, so that would be pretty accurate.

Q. All right. So we have Lenzis up in Roseville. Now, how far was Roseville from the City of Sacramento would you say? A. 15 minutes.

Q. By automobile? A. By automobile.

Q. Now other than this Roseville dealer, who did about $60,000 in 1966—and by the way, do you have any recollection as to what Lenzis in Roseville did in

1965? A. I would have to defer to the record. If you want to guess, I would say about the same.

Q. How about 1964? A. I don't know whether he was a dealer in '64.

Q. Okay. Now is it not a fact, sir that since 1963, the only other dealer that has been approved in the City and County of Sacramento is this branch of Sherman Clay? A. That's correct.

Q. And is it not a fact, sir, that since 1963 **[533]** Mr. Hines has not even solicited other Sylvania dealers within the City and County of Sacramento? A. Since '63?

Q. Yes, sir. A. I would say since '64.

Q. All right. And as a matter of fact, you not only agreed that Mr. Hines should not solicit further dealers, but you instructed him not to do so, isn't that a fair statement? A. That's a fair statement. Again, I hate the word instructed. I counselled him.

Q. Now, prior to June of 1965, Mr. Shahood, on behalf of Continental T.V., indicated to you that his chain of stores planned as their next expansion move to open a store in Sacramento? A. Prior to June of 1965?

Q. Yes, sir. A. He did tell me he was going to open a Philco store in Sacramento.

Q. That's right. He told you that he would not—he told you that primarily he would be handling Philco merchandise? A. Correct.

Q. And you discussed generally speaking the market **[534]** situation in Sacramento with Mr. Shahood at that time, did you not? A. Generally speaking the market situation, yes.

Q. And you told him in substance that Handy Andy was giving Sylvania more than 10 percent of all industry sales in that county, isn't that right? A. I'm sure I would have.

Q. Isn't that an accurate figure at that time? A. That is true.

Q. Now that was above Sylvania's national average as far as penetration? A. Considerably.

Q. What would you estimate the national average to be at that time? A. I can't respond to that because it is an estimation. We don't get figures on our national average, but my estimation would be about four percent.

Q. All right, sir. Of course, Sylvania, I assume, is interested in as large a share of the market as it reasonably can obtain in a given market. A. Reasonably, yes.

Q. Now, Mr. Shahood did not ask you for a franchise at that time, did he? **[535]** A. negative. He did not, so that's affirmative.

Q. As a matter of fact, in your discussions with Mr. Shahood be indicated to you that he assumed that a franchise would not be available for that location, isn't that a fair statement? A. I don't have a memory of that.

Q. Mr. Shahood also had discussions with you about the same time about a possible location in Stockton, did he not? A. Correct. I don't know about the timing, but we did have a discussion about Stockton.

Q. And you responded to Mr. Shahood that Sylvania's penetration or market shares in that market,

the Stockton market, was in need of help, right? A. Not in need of help; was below national average.

Q. Didn't you feel that your company needed help with additional dealers in that area? A. Well, again, it is a matter of semantics. I don't like the word "help". We needed coverage and we needed another dealer.

Q. What does coverage mean? A. Another dealer.

Q. And you told Mr. Shahood that in substance? **[536]** A. Correct.

Q. And you told him further that Mr. Hines needed another dealer in Stockton? A. That's synonymous.

Q. If Mr. Hines needed a dealer in Stockton, you needed a dealer? A. Correct.

Q. If Mr. Hines did not need another dealer in Sacramento, neither did you? A. That's correct.

Q. So I take it that there was no consideration given as to whether Continental would be compatible with Handy Andy on Fulton Avenue in Sacramento? A. There was no consideration given, that's correct. It wasn't discussed.

Q. The only consideration, as I understand your testimony, was whether or not Sylvania needed another outlet there, and that decision on that was that you did not? A. That discussion—would you rephrase the question—repeat the question.

Q. As I have understood your testimony to date, Mr. Carroll, that when you first considered Continental going to Sacramento, that the chief consideration with you **[537]** personally was whether or not Sylvania needed another outlet in the City and County

of Sacramento. A. Well, as we responded before, we never considered the Continental going to Sacramento because Mr. Shahood never discussed the possibility.

Q. But had he discussed it, the decision would have been negative, correct? A. We can't say that. We have to evaluate all of the factors.

Q. Mr. Carroll, is it not a fact, sir, that in August of 1965, you would not have approved a franchise for any dealer in the City and County of Sacramento? A. That is not correct.

Q. It is not, sir? A. It is a fact that we did not, but it is not a fact that we would not, if I understood the question.

(Continued on next page.)

[538] Q. I refer you to page 186 of your deposition, Mr. Carroll, commencing at line 2.

"Q. And you are not encouraging new locations in Sacramento to date, are you?

"A. No.

"Q. You haven't for some years?

"A. We are getting four more percent this year than we did the year before. In other words, we are getting a good distribution, so that is true.

"Q. In your opinion, Mr. Carroll, if Continental T.V. had continued to operate in Sacramento with Sylvania merchandise, would that have reduced the penetration of Sylvania in that area last year than the year before?

"A. Would it have reduced the penetration?

"Q. Yes.

"A. I don't think so.

"Q. Is there any reason that you know of today why Keith Anderson, Handy Andy and Continental T.V. were not compatible in Sacramento?

"A. As I say, we never even discussed it.

"Q. You never considered the fact that Keith Anderson and Continental T.V. might or might not be compatible in Sacramento?

"A. No. The discussion prior to that was not **[539]** whether we would be compatible but whether we needed, as you put it, another outlet. The answer was we didn't.

* * *

"Q. In 1965, in September, in the fall, I take it from your testimony you would not have approved a franchise for any dealer in Sacramento for Sylvania products?"

Page 187.

"Mr. Popofsky: May I have that question read back please?

"(Record read.)

"Mr. Popofsky: No matter what the circumstances?

"Mr. White: Q. For a new dealer, branch dealer or anything else?

"A. In the fall?

"Q. Yes.

"A. What do you mean by the fall?

"Q. Sometime in 1965.

* * *

[540] * * * "Q. I mean any dealer.

"A. In the fall of 1965?

"Q. Yes.

"A. In the fall of 1965 the privilege—the privilege of approving any new franchise was eliminated from September 1 on.

"Q. Let's take August, 1965.

"A. That is true.

"I wasn't in favor of any new dealer in Sacramento."

Now—

* * *

"Q. This would include Macy's or——

"A. In other words, one of the factors which we decided on in putting on a new dealer is need. Need means getting our share of what the industry does in that market place. We were getting more than—we were getting more than our share, national share of that market place and, therefore, it was a mathematical factor and a mathematical fact that Sylvania didn't need further coverage in Sacramento."

* * *

[541] * * * Q. Now, I put these questions to you, sir, and you gave me those response under oath at the time of your deposition, is that correct? A. That is correct.

Q. And they were true at that time, were they not? A. That is correct. And they are true now.

* * *

[551] Q. And, sir, is it not a fact that in your opinion at the time Continental TV could have com-

peted successfully with Handy Andy at the location on Fulton Avenue? A. Again, in my opinion, I never evaluated.

Q. Never considered it? A. Never came up.

Q. I take it the problem at the time, as far as you were personally concerned, was that Mr. Hines did not approve of the location before the merchandise was brought in for display and sale? A. The problem was that that the usual counseling of our direct factory dealer with his District Manager, Mr. French, and with me and with Jim Hines did not take place.

Q. That was one of the problems, was it not? A. Correct.

Q. All right. Now, has this ever occurred—by this, I mean dealer moves merchandise from one franchise location to a non-franchise location without seeking preapproval from Sylvania—have that set of circumstances ever occurred prior to the situation with Continental in Sacramento? A. Had it occurred prior in Sacramento or anywhere?

Q. Anywhere in your region. A. In my region? Yes.

Q. Now, what did the sales department do in such **[552]** a situation to induce the dealer to conform with Sylvania's policies? A. Assuming the dealer is franchised in another location, the District Manager can persuade him that it is in our best mutual interests or try to persuade him that he stick to the franchise location.

Q. And if he declines to do so, is there any other management tool that can be utilized to straighten that situation out? A. Management tool? Negative.

Q. Can a sales department do anything else under those circumstances? A. The District Manager who is the direct contact if that factor were added to others and he found this wasn't a continuing growth prospect and he discontinued servicing the account.

Q. He could just merely stay away, couldn't he? A. Correct.

Q. He would not call on the dealer, correct? A. Correct.

Q. And he would not talk to the dealer by phone? A. That is correct.

Q. As a matter of fact, that procedure has been utilized with such a nonconforming dealing prior to Continental's case, isn't that right? **[553]** A. I would think so.

Q. To your personal knowledge, it is so, isn't it? A. Yes.

Q. As a matter of fact, Mr. Carroll, while you were in *Delwood,* New York, Mr. Steiner told you not to have any further contact with Continental TV, did he not? A. He counseled me to stay out of it, because it was a credit matter.

[Continued on next page. Nothing omitted.]

[559] * * * Q. All right, sir. When did you first become aware of the allocation program? A. My memory of that would sometime around the middle of September.

Q. 1965? **[560]** A. After my return from Delwood.

Q. All right. Now, how were you made aware of the allocation program? A. The initial communication was a telegram.

Q. And from whom? A. John Morgan.

Q. Mr. Morgan, the Vice President of the company? A. Correct.

Q. And in substance what did the telegram say? A. As I recall it, it said to stop taking orders. It did not spell out the allocation, but that was the first indication of the allocation program.

Q. Did it give a reason? A. Not in the telegram.

Q. Have you seen a copy of that telegram from that time until the present time? A. I don't think so. You have one? I would like to see it.

Q. I can assure you I don't. A. As I recall, it was a very short telegram, said stop taking orders, explanation will follow.

Q. This would be termed, I suppose, a sales hold on all orders, correct? A. Correct.

[561] Q. Now, are you aware of any other sales hold, Mr. Carroll, that occurred at any time prior to the receipt of that telegram? A. Sales hold? I don't remember any.

Q. Correct. To your knowledge, at least, there was no previous sales hold placed on any particular dealer that you knew of in your region prior to the receipt of this general sales hold telegram? A. I think not.

Q. After you received the telegram, did you instruct your salesmen? A. Yes sir.

Q. And in substance what did you tell them? A. Exactly what the telegram said.

Q. All right. Did you instruct them to relay this information on to their dealers? A. Yes sir.

Q. It was important for the dealers to know about this as soon as possible, wasn't it? A. Right.

Q. I am sorry? A. Correct.

Q. Because dealers may have pending orders and certainly they should be informed of the fact that those orders **[562]** would not be shipped if in fact they were being held under this sales hold, correct? A. That's true.

Q. So there was that urgency in notifying dealers at that time? A. Correct.

Q. Now, when was the allocation system in fact working, and by working I mean when were shipments flowing under the allocation program? A. Well, again, as I remember it, it seemed about a two week administrative delay.

Q. Would you say—excuse me. A. Within two weeks from the date of the telegram, about the first of October.

Q. O.K. Would you say by October 1st that the shipments were flowing under the allocation program to your dealers? A. I would say so.

Q. Did you foresee this allocation personally? A. Negative.

Q. It was a surprise to you? A. Correct.

Q. Was it your understanding that all manufacturers in the industry were pretty much caught flatfooted with this unprecedented demand? **[563]** A. At that point.

Q. Yes sir. A. Yes sir.

Q. Was it also your understanding that just about all the other major, or let me say all, major manufacturers, including Sylvania, devised some type of allocation system? A. Yes sir.

* * *

[588] * * * Q. Mr. Carroll, yesterday you were asked a number of questions about the Elbow Room policy. Do you recall those questions, sir? A. Yes sir.

Q. Are you familiar with the background and the [589] origins of the Elbow Room policy? A. Yes, I am.

Q. Can you describe for us, sir, the market conditions in which Sylvania found itself at or about the time that the Elbow Room policy was first adopted? A. Yes. I came with Sylvania in 1963 and at that time the Elbow Room policy had been adopted and had been implemented in parts of the United States and at that time they were ready to implement it energetically in Northern California and hired me coincidental with that decision.

The Elbow Room policy which had been implemented in other parts of the United States had proven very successful and the background of it was that in 1962 when the decision was made to go step by step in the United States Sylvania was a "me-too" supplier, if you will, in that it had wholesale distribution all over the United States and was one of many competitors following that route.

Q. When you say, sir, wholesale distribution, what do you mean? A. Two step distribution where the supplier sells to a wholesale distributor who in turn sells to a retail operator in his given territory.

Q. Does the wholesaler inventory a supplier's stock? A. The wholesaler inventories the supply of merchandise for his district.

[590] Q. And then a particular dealer, retailer, can draw upon that inventory? A. That is correct.

Q. Would you proceed, sir, to describe the market conditions. A. In that type of distribution you had most of the suppliers in the United States and two were notably successful, RCA and Zenith, and then the Motorola, the Philco, the Admirals, the Olympics, the Sylvanias, General Electric, Westinghouse, etcetera, were actually floundering and Sylvana especially was floundering to a point where the management decided either they had to come up with a more meaningful form of distribution for their product or cease being a supplier of television and stereo.

Q. You mean simply go out of business? A. Go out of that particular part of the business.

Q. Sylvania, of course, manufactures other products? A. Correct.

Q. Like flashbulbs—— A. Light bulbs.

Q. Light bulbs. I'm not sure what else, but that was the issue as you understood it based on your conversations with the manufacturer? A. That is correct.

Q. So prior to 1963 what was Sylvania's policy with [591] respect to selling its products to retailers? Would it sell to anybody who wanted to handle it? A. They weren't selling direct, they were selling through wholesalers. The decision as to who would buy them from the wholesaler was his alone.

Q. So far as you know, did the general wholesalers for Sylvania follow what might be called a saturation type of policy, sell to anybody? A. That's true. And, as I mentioned, very unsuccessfully.

Q. Do you know what Sylvania understood its relative market share—that is to say, the share of the overall television market in the United States was at or about the time it adopted Elbow Room? A. In 1962 I have heard that it was as low as 1½ percent. That was before I came with them.

Q. This would presumably vary from market to market? A. That's true, but that's an average figure, as I remember it.

Q. What was the solution to this marketing problem, if I may call it that, what you understood was adopted by Sylvania? A. The solution was to, in the metropolitan areas, adopt a direct factory franchise type of operation where the wholesale distributor would be eliminated and the factory [592] directly to a select group of dealers who were in a position to take for the consumer take on whatever it was the distributor was supposed to be doing, such as inventorying the merchandise so that it is there for delivery, giving a broad selection of the merchandise to give the consumer a chance to see the cross section, if you will, of selection that Sylvania makes available.

So the requirements, obviously, on a direct factory franchise are much greater than on a saturation type franchise where they buy from a local distributor.

On the other hand, the solution came up by making it possible for this type of a dealer because of the savings inherent in by-passing the wholesale distributor to have a suggested list price, suggested retail price, which was competitive with the discounted price, if you will, of our competitive brands, such as the RCA, Zenith, Admiral, etc., and therefore to get

a fair return for this investment that he is making in a direct factory franchise.

As I mentioned even before I came with the company in 1963 this had proven to be very valuable not only to Sylvania but other dealers who were franchised and working very well and we had become a competitive factor in the New York market, for instance, where they went first with this.

And therefore they felt that rightly that it could be and should be extended so that indeed Sylvania should continue [593] to grow as a competitive factor and be healthy as a supplier, have a healthy family of dealers so that the consumer does have a true competitive opportunity to choose between Sylvania and all of these other manufacturers.

Q. Taking New York as an example, what was the result in terms of the number of dealers by way of implementation of the Elbow Room policy? A. In Northern California?

Q. First, in New York City, where you first tried it? A. I don't have any figures on that, Larry.

Q. All right. Was it part of the Elbow Room policy then to go to a system of select dealers as opposed to dealers with a—— A. That is correct.

Q. Was the effect of this, to your knowledge, a reduction in the number of dealers—— A. Necessarily so, but I don't have the figures. Right.

Q. All right, using Sacramento, which we have a chart which has been supplied by opposing counsel, is it not true that the effect of this type of distribution policy going to selected dealers does produce, in the implementation of the policy, the reduction in the

number of dealers? A. True, because the dealers with a wholesale **[594]** distribution approach, which is also used by the factory branch type operation is that you have dealers who have primarily a service shop with one or two sets, and, of course, they couldn't qualify for a direct factory franchise and give the service that is needed for such a form of distribution.

* * *

Q. One last question on the general range of factors, the general range of history of this program, Mr. Carroll. Did any other TV manufacturer have a similar type of system? A. Yes, in a market survey where Sylvania studied what was going on in the industry to decide whether to get out of the business or stay in it, Magnavox was the only other, really, major factor in the business who used a direct factory **[595]** franchise type of approach.

Q. To your knowledge did Magnavox adopt this system prior to Sylvania's decision to adopt it?

* * *

The Witness: Yes, Magnavox had been doing it for a long time prior to Sylvania's decision.

Q. To your knowledge had Magnavox been successful in marketing its product in this manner? A. Yes, Magnavox has been very successful.

Q. With reference to the factors that Mr. Miller discussed yesterday and with counsel's leave I will must mention those that were discussed: Financial capacity, size of dealer display, dealer attitude and physical proximity.

In implementing the Elbow Room policy, sir, with respect to physical proximity, have there been occasions where Sylvania has in fact put the dealers virtually next door to one another? **[596]** A. Very definitely.

Q. Can you recall such an instance? A. In San Francisco, where we have a big metropolitan area, we had the White House Department Store and Sherman Clay coincidentally and they were on the same block, indeed back to back, building to building.

Q. In implementing the Elbow Room policy and the factors you mentioned that you considered market study and market penetrations. Why did you consider those factors, sir, in making the decision how to implement the policy? A. Well, in the research as to why and how this direct factory franchise works, it was important that the individual dealer who was investing heavily in this type of a franchise, should have an opportunity to get a fair return, and one of the factors he needs for such an opportunity is an unsaturated distribution so that he can indeed get a fair return. And where they have become oversaturated we found that it worked neither to the Sylvania advantage or the dealer advantage.

Q. Market penetration affects both the dealer and Sylvania, then? A. Very definitely.

Q. Counsel asked you about those areas in which Sylvania had adequate penetration in 1965. Are you familiar, **[597]** sir, with the Sylvania penetration figures which were made available to you during the year 1965? A. For Northern California.

Q. For the Northern California area. We have prepared various charts for certain of the counties in Northern California, Your Honor. Mr. Carroll, you have looked at these charts, have you not? A. I have.

Q. To the best of your knowledge do they accurately set forth the industry-Sylvania penetration for the year 1965 by color TV sets, by county in Northern California and Northern California? A. That is correct.

* * *

[598] * * * Q. Mr. Miller asked you on direct—cross examination, Mr. Carroll, several questions about the market share and market penetration, did he not? A. I believe that is correct.

Q. And he asked you questions which elicited various percentages of the market share? A. Yes.

Q. And you gave answers to those questions based on your personal knowledge, did you not? A. Right.

Q. And based on the EIA figures which were made available to you through Sylvania?

* * *

Q. Did you base these answers you gave Mr. Miller in part on the EIA figures given by Sylvania? A. I did. That is my source for that information, no other source.

Q. All right. Could you explain how you received **[599]** the EIA figures? A. They come to us monthly.

It's an industry preparation of all competitors as to what, as to where their sales of color television,

black and white television, console stereo and portable stereo are sold by county.

They are fed into the industry computer and then they are fed back in total figures to each individual supplier without divulging what the other supplier is doing, but giving him a total of what the industry is doing.

Q. And you get Sylvania's percentage, then? A. We get Sylvania's percentage share and the industry total.

Q. All right. Now, quite aside, sir, from the finite accuracy of these figures do you in fact use them in making your market judgments in implementing the Elbow Room? A. We do and it is industry practice, actually.

Q. Now, based, sir, on your personal experience in Northern California over the last eight years working with these figures, do you believe them to be substantially reflective and accurate insofar as they state Sylvania's market share? A. I'm sure they are accurate and substantially useful and a good guide for our business.

[633] * * * Q. Mr. Carroll, to pick up roughly where we were, you have looked at these charts, have you not? A. I have.

Q. And to the best of your knowledge, do they actually reflect the penetration data or market penetration data for colored TV for the year 1965 in various Northern California counties and for Northern California as a whole? **[634]** A. Sylvania's share of the industry.

Mr. Popofsky: Your Honor, we would offer these charts consisting of the county by county penetrations for eight Northern California counties and the total of Northern California.

* * *

The Clerk: Defendant's A and B in evidence.

[Charts marked Defendant's Exhibits A and B received in evidence.]

* * *

Mr. Popofsky: Q. Mr. Carroll, I direct your attention first to the composite for all of Northern California. What does that show? A. That covers my jurisdiction region, if you will, Northern California versus Northern California from Kern County **[635]** north to the Oregon border and including the Northern counties of Nevada.

That by description is the Northern California region. That shows that in the year 1965 Sylvania sold in that region 4.92 percent of what was reported to be sold by the industry.

Our competitors, obviously, RCA, Zenith, Magnavox, etc. sold 95.8 together.

Q. Now, turning to specific counties for the year 1965, could you just give the Sylvania county total by county. A. Sacramento County, Sylvania 13.39 percent of industry; Marin County, Sylvania 7.67 percent of industry; and San Francisco County, Sylvania 2.51 percent of industry; Contra Costa County, Sylvania .84 percent of industry.

[Continued on next page. Nothing omitted.]

[636] Q. That's less than one percent? A. That's correct.

* * *

The Witness: Alameda County, Sylvania 4.03 percent of industry; San Mateo County, 6.98 percent of industry; Santa Clara County, 7.05 percent of industry; Monterey County practically nothing.

Q. .07. A. .07 percent of industry.

Q. All right. Now, Mr. Miller brought out in his questioning about these charts that these charts depict the locations at which the merchandise is received by the customer, is that not so? A. Right. The EIA figures from which these charts are made come to us on a monthly basis from the trade association known as Electronic Industry Association.

Q. Would you have to, in using these charts, adjust them for any branch operations that might exist in these specific counties? A. We don't use those charts and adjust them, but we have, of course, our own personal knowledge of the branch operations and in our counsel between District Manager and Regional Manager these factors are taken into consideration in our decisions.

[637] Q. All right. For example, in Monterey County, which is where Salinas is located? A. Correct.

Q. Is that correct? Mr. Shahood and Continental TV had a branch, an affiliate operating in Salinas, did they not? A. That's correct.

Q. Now, where, in these county by county figures would the merchandise that was sold in Salinas show up, to the best of your knowledge? A. It would show up in Santa Clara County

Q. In Santa Clara County. Without exception, what branches are these figures, so far as you are aware, substantially reflective of Sylvania's actual

market penetration? A. Well, as I have said, over the years since I have been in the television end of this business, which is since 1964, we have always used the Electronic Industry figures as a guide for our distribution with, as I mentioned earlier, the additional input of the District Managers, whether it was a wholesale distributor or direct factory, as to the branch operations.

These are the best figures that this industry has for use and it is a true guide for us, continuing.

Q. Do you have any reason to believe that any particular **[638]** manufacturer would falsify its input into these figures? A. I think prima facially is that there is no benefit in falsifying. To the contrary, it just isn't logical for anyone to falsify.

Q. You know personally the relevant market share of RCA, Zenith, Admiral, G.E or any of the others? A. Only from reports that come in the trade journals, like Home Furnishing Daily.

Q. You don't have EIA figures which would break out—— A. That's why there would be no benefit in falsifying. The EIA will not report such figures, that is part of the assurance of accuracy, that there is no benefit for falsifying.

Q. Now, with respect to the use of these market penetration figures you told us yesterday that you used them as a tool in making the Elbow Room decisions. A. Correct.

Q. How would you use them in the ordinary course in implementing Elbow Room? A. Basically we are given quotas, as has been established, and our aim, of course, is to grow profitably both for our channels

of distribution, our retailers and ourselves, and our experience has been that where we do not overload a given trading area with dealers that dealer prospers and does **[639]** a better job for himself, for us and for the consumer in our type of a franchise.

So where our trading areas are giving us better than our average performance as a region, and those are the figures I really work with, even more so than the national average, going back to that initial chart which showed that my region did 4 percent plus in 1965, where we do a better than that regional average, well, then, we counsel our District Manager to spend his time for prospecting of new accounts in the area where we are doing less than average to bring them up, because there is a larger percentage of that particular market that is available to us, reasonably speaking, based on the merchandising plans of Sylvania versus all the other competition.

Q. In 1965 how did Sacramento County, how did you personally evaluate Sacramento County using the criteria you just described? A. Well, it was clearly better than three times our regional average.

Q. How did you evaluate San Francisco County? A. Even with the branches put in it was well below our regional average.

Q. Now, sir, in considering the various factors which counsel discussed with you yesterday in considering the market penetration figures, who made the decision on whether or not **[640]** to franchise a dealer in implementing the Elbow Room policy? A. It was a joint decision. The final word should be and was with the District Sales Manager.

Q. That is the Sylvania District Sales Manager? A. Sylvania District Sales Manager.

Q. All right. Did any existing Sylvania dealer participate in the decision making process? A. Negative.

Q. Did they have a right to say no to any decision? A. Negative.

Q. Did any representative of the John P. Maguire & Co. participate in any of the decisions concerning the Elbow Room policy? A. Nothing to do with it.

Q. Did you ever talk to any of the Maguire people about whether or not to franchise a dealer? A. Negative. I did not.

Q. Incidentally, in connection with Maguire, that was the Sylvania financing plan which was offered, was it not, to the various dealers if they so chose? A. It was a Sylvania what?

Q. Finance plan which was offered to dealers if they elected to use it? A. Correct.

[641] Q. In 1965 approximately how many of your dealers in your general area expressed as a percentage, as best you can recall, elected to use the Maguire plan? A. Well under 50 percent of our business was done with the Maguire Company.

Q. What other kinds of financing arrangements could a specific dealer utilize, if he desired? A. Well, we were then and still do, use bank flooring, Bank of America, Crocker Citizens had a flooring plan. There are other finance companies who have flooring plans. Any local finance company was accepted by Sylvania credit department, and there were numerous.

Q. Now, with respect to the decision to franchise a particular location, did you outline to a specific dealer as part of your ordinary sales presentation the elements of the Elbow Room policy? A. Definitely.

Q. Was it part of your instructions to your salesmen of any part of the Elbow Room plan to extract a promise from the dealer that he would not remove his merchandise from an authorized location to some other unauthorized location? A. A promise? To the contrary.

Q. A promise or—— A. No promise.

Q. No promise. **[642]** So far as you know, was he free to do so if he wanted to move the merchandise that he owned to some other location? A. As far as I know he was free to do so.

Q. Was he free to open up a new corporation somewhere else if he wanted it so far as you know? Or to open up a branch of the same corporation? A. Correct.

Q. But it was your policy that he was authorized by Sylvania only to sell from a designated location, is that correct? A. That is correct.

Q. Did you hope he understood your policy? A. We tried to persuade them to understand it.

Q. You hoped he would honor your policy? A. Actually found it again, going on the record we found it successful for him to do that and for us mutually, it was the way we were growing.

Q. In fact, Sylvania as a competitor in the marketplace, grew, did it not, from 1962 to 1965 through utilization of the Elbow Room policy? A. Yes. I'm

sure the record will show it grew successfully, substantially.

Q. Reaching, at least in Northern California, almost 5 percent of the color TV market? [643] A. Correct.

Q. And what is it, incidentally, in 1970? A. 1970, Northern California's current going rate for the first six months is six and a half percent.

Q. Are you still marketing your products through the Elbow Room philosophy? A. We surely are.

Q. You are fair trading your merchandise, however, so far as price is concerned? A. That is correct.

Q. With the exception of the fair trade practice, are there any other changes in the basic outline of Sylvania's Elbow Room policy in 1970? A. The basic outline remains substantially the same.

Q. While we are on this subject of the results, I show you, Mr. Carroll, a map which we have prepared which purports to show Sylvania's franchise dealer locations in Northern California in the calendar year 1965, ask you if you have looked at that map? A. I have.

Q. This map contains various red dots for franchise locations other than Continental and its affiliates and blue dots for Continental and affiliates. Is this map substantially accurate so far as you know, Mr. Carroll, for the calendar year 1965? [644] A. Yes, it is.

Q. Does it purport to show those locations which were at some time or other during 1965 in fact franchised? A. That is correct.

Q. By location.

Mr. Popofsky: We will offer this map, Your Honor, as Defendant's next in order, Number 70.

* * *

The Clerk: Defendant's 70 introduced and admitted in evidence.

[Map marked Defendant's Exhibit 70 and received in evidence.]

Mr. Popofsky: Now, there has been a lot of questions that have been put to you, Mr. Carroll, about territories and I think there have been territories defined for Mr. French, Mr. Hines, Mr. Hallday and even for you. Are these Sylvania territories?

The Witness: Wholly. Obviously there are no walls between counties and so Sylvania's marketing plan is to give the responsibility for geographic areas within which, as we have testified, there is a sufficient potential for our limited share of this total television business for an individual District Sales manager to get a fair return on his investment of time and effort as our employee.

[645] Q. Is there any restriction on a particular dealer as to where he might sell his products? A. None.

Q. Let's take the Peninsula area which shows a range of 9 or 10 authorized Sylvania dealers ranging down the Peninsula within approximately 20 miles. Were there any restrictions in Elbow Room policy as to what customers they might sell? A. None.

Q. Or where they might try to sell their product? A. None at all.

Q. Or categories of customers who come that they might sell? A. None.

Q. And is it likewise true up in Sacramento? A. That is true everywhere.

Q. Where there are three in the city and county but other dealers in the general environs. A. True.

Q. Mr. Carroll, is it the practice under the Elbow Room policy, if I may use the language which caused you pause yesterday, to eliminate same brand competition? A. Definitely not to eliminate same brand competition.

Q. Why did that language in the Sylvania sales manual cause you concern yesterday? **[646]** A. Well, basically it didn't have a qualification in that particular sales manual that is given to us in our orientation and that we use in practice and that qualification is to eliminate same brand cutthroat competition which eliminates the possibility of a fair return. A combination of competition, Sylvania competition is always there so that someplace a dealer—a consumer, in fact, can have a choice as to where he buys. Now, that is not true in the sticks where there are so many miles—up in Weed, for instance, I'm sure they only had one dealer and I'm sure anybody in Weed who wanted a television set were going to have to go to that dealer, because there are probably only two television dealers in that town. But in the metropolitan areas we are anxious to have and do have, indeed, where we are successful, a choice of dealers to whom the consumer can go.

Q. As part of the Elbow Room policy was it always possible for you to authorize a new dealer to go into any area? A. Yes.

Q. For example, take Salinas. In Salinas you only had one dealer, is that correct? A. It was still possible for us to franchise another.

Q. And that one dealer was Continental TV, an affiliate of Continental TV? **[647]** A. That is right.

Q. Now, so far as you know, Continental TV was not given an exclusive in Salinas, was it? A. That's true, we did not give an exclusive.

Q. You're familiar with the practice of major American industries in distributing their products to give an exclusive? A. Yes sir.

Q. Can you describe for us, sir, the basic difference between the Elbow Room policy, as you understand it, and the practice of giving exclusives? A. Well, in our Elbow Room franchising policy we definitely don't give exclusives for the reason that if it is in Sylvania's interest and, if you will, in the dealer's interest and in the consumer's interest in a given marketplace for another dealer to be franchised, then that's a unilateral decision that we want to reserve the right to make and we do reserve the right to make that decision.

Q. Mr. Miller yesterday put a hypothetical situation to you yesterday about an exclusive. I think he hypothesized an exclusive up in Sacramento and he suggested the possibility that that exclusive might charge $75 more than the suggested price. Do you recall that? A. Yes, I do.

[Continued on next page. Nothing omitted.]

[648] Q. Is there, so far as you know, any situation in the United States where Sylvania has promised that it would not put another dealer into an area

if the dealer tried that kind of pricing? A. Not so far as I know, and definitely not in Northern California.

Q. Incidentally, do you know what Continental's pricing policies were in 1965? A. Well, as was indicated in yesterday's testimony, Continental's policies were very promotional, and his pricing policies were higher than suggested retail, which in his judgment was very successful and gave what he called services beyond just the product.

Q. But their practice was, for example, in Salinas to charge higher than Sylvania's suggested price? A. That is correct.

Q. Did, for example, Sylvania in Salinas where only one Sylvania dealer existed, Continental, if the prices went too high, for example, to put on another dealer? A. We never articulated that if the prices went too high we would put on another dealer. I would just respond to that, counsellor, that we always reserve the right to put on another dealer.

Q. In the major metropolitan areas there were, so far as you know, always more than one, is that not so? **[649]** A. Definitely.

Q. With respect to the subject of price, Mr. Carroll, was it Sylvania's practice, to your knowledge, to enter into any agreement with a dealer that that dealer would charge a specified minimum price? A. In 1965?

Q. In 1965. A. Negative.

Q. What was Sylvania's practice in that regard? A. Sylvania's practice was to print and make avail-

able to, and be sure each dealer had a suggested retail price for each of our models. And that price was set or arrived at by the competitive pressures of all of our competition a la Zenith, RCA, Admiral, et cetera. And within the framework of that we found from our market surveys that if the dealer would sell at our suggested retail prices he would, number one, compete very successfully against the many brands that are competing with us. Number two, he would make a fair return on his investment in Sylvania.

Q. Now you issued the suggested price sheets, did you not, to your dealers? A. We did.

Q. Did you hope that they would follow these **[650]** suggestions? A. Indeed we did, and we tried to persuade them to do that for the reason we just mentioned.

Q. Counsel used the word in asking you about this subject yesterday "induced." What kind of induction or inducement to your knowledge did Sylvania use—— A. I don't know what Webster's says induced means, so all I can say is that the positive persuasion approach that it is in the dealer's best interest to get a fair return on his investment with our method of trying to get each dealer to sell at our suggested prices.

Q. Were there instances where dealers in fact sold below the suggestions? A. I'm sure there were.

Q. Did Sylvania from time to time continue to do business with such dealers? A. We did.

Q. Mr. Carroll, in your judgment was the elbow room policy as you saw it, and as you implemented it

from 1963 to 1965, successful in the marketing of the Sylvania product? A. To a very definite degree. We have come to a point where we are recognized now as a true competitor in the industry, whereas in 1963, **[651]** most people that I called on in the trade, the dealers said, "Oh, I thought you were out of business." There is just no question today that Sylvania is one of the major competitors, certainly one of the five major competitors in the television business in Northern California.

Q. There are still much larger companies in terms of market share, are there not? A. Oh, yes. Obviously with only six and a half percent of the market, we are, I would say, probably in fifth place.

Q. Has the elbow room marketing philosophy contributed to that? A. I'd say it is one of the primary factors in that success.

Q. What has been the general effect, to your knowledge, on dealers? A. Well, the beautiful thing is those dealers who are part of our franchised family as pictured on that map have prospered with us and they have grown from uncompetitive dealers, as well as we have grown from an uncompetitive supplier to a factor in each marketplace serving the customers.

Q. I take it there are exceptions to that as well? A. Oh, definitely.

Q. With reference to the Sacramento market in **[652]** particular, Mr. Carroll, I am assuming that this chart included some addition for the Sherman and Clay branch; what has been the effect of the elbow room policy in the general Sacramento County area?

A. Well, the effect has been that where in 1962, the records that were given to me as I came into the Sylvania family showed Sacramento to have about the national average share market wise. It has grown to a place where we are now, I would say, probably in third place in Sacramento in share of market in the industry of 12—in the industry of over 10 certainly suppliers.

* * *

[656] * * * Q. Mr. Carroll, do you recall a Sylvania franchise dealer in San Francisco by the name of Young Bros.? A. A Sylvania franchised dealer?

Q. Let's start with a dealer named Young Bros. A. Yes, we do know Young Bros.

Q. When, sir, did the question of Sylvania franchising **[657]** Young Bros. first come up? A. I'd say that he was approached first by Jay Hallday in 1964, when Jay first came to work for us, replacing myself. I approached Young Bros. early in the Sylvania experience which I had, probably in the fall of '63, and they were not interested. But they were certainly approached by me in '63. That would be the first efforts.

Q. Bring your mind, if you would, sir, to the spring of 1965. Did you attempt to solicit Young Bros. at that time for a Sylvania franchise? A. Yes. Jay Hallday brought them to a point of interest in which Dave Young and his sales manager came out to see some of the merchandise that we had in our Burlingame office and two, away from the hustle and bustle of his store, review our elbow room philos-

ophy, if you will, and our advertising policies which are written, and to see whether indeed it would be mutually advantageous to consider a franchise for Young Bros., or for Young Bros. to consider Sylvania.

Q. Do you recall when this occurred, approximately? A. I couldn't put a month on it. It was certainly before the June convention.

[658] Q. Did you have occasion to discuss the possibility of franchising Young Bros. with Mr. Shahood? A. Well, discussed the possibility—I am a semanticist, as you say. I would have to say that I in effect don't discuss those possibilities with any of my dealers and didn't at that time. Mr. Shahood brought it up and indicated to me that as far as he was concerned Young Bros. would not be a compatible dealer. Now, I told him at that time that this is something that we do not discuss. We don't allow our dealers to tell us and we don't collude with our dealers about whom we should sell. And we don't ask—we don't tell the dealers who they should buy from. So it is a mutual thing. So any discussion on that—I asked Mr. Shahood to defer, because it actually puts me in an embarrassing position in considering another account to have one account tell me: "If you put him on I am not going to handle your merchandise," which Mr. Shahood did.

Q. Did Mr. Shahood say that? A. He said that about his San Francisco operation. He said: "If you were to put Young Bros. on, I would not sell Sylvania in San Francisco."

Q. Was this prior to the June, 1965 show in Chicago? [659] A. Yes.

Q. Do you recall approximately when? A. Well, I recall that it was more than once, and each time I tried to get him to stop discussing it that way; and that it wasn't reasonable for him to take such a position, but I couldn't tell you exactly when, no.

Q. Did Mr. Shahood express any reasons why he objected, if I may use that description, to Young Bros.? A. Again, as I remember it, it was because of his experience as a neighboring dealer when he had the Munn's Franchise on Mission Street. Again, this is my memory of it; that he personally did not want to do business with a supplier who did business with Young Bros.—a personal reaction.

Q. That's what Mr. Shahood conveyed to you at least? A. That's my memory of it.

Q. All right. Now, sir, was Young Bros. invited to the Chicago show? A. Negative. We only invite prospects whom we have decided definitely we want to sell.

Q. Had such a decision been made with respect to Young Bros. prior to the June, 1965 convention? A. Negative.

[660] Q. Mr. Shahood was invited, was he not? A. Very definitely.

Q. And Mr. Shahood was present, along with other dealers, at the Chicago convention? A. Correct.

Q. Can you describe for us, sir, the circumstances which led up to Mr. Shahood signing initially a quarter of a million dollar order for Sylvania merchandise? A. At that convention?

Q. At that convention. A. Well, yes. Basically the convention is a presentation of our new models

for the next year, so that would have been the 1966 line. They are presented to the group of key dealers who are invited and distributors. And following that they are then put on display in a complete display area, and the district sales manager who covers—this would have been Lee French and George Shahood, who cover the individual dealer, takes that individual dealer, after they have been presented from the platform with the whole program, advertising, merchandising, the support program for their efforts and the merchandise, and then the final thing is that the dealer looks at the merchandise and touches it and gets the feel from his experience which models will sell best in his market. And he counsels with our district sales manager, projects the **[661]** amount of business within the framework of that business available to him, starting as a platform the business he did, and the prospects of the industry as to how much business is going to be done, and then his share of it—we like to project roughly 20, 25 percent of the year's business on that order.

Q. All right. Now this process was gone into with Mr. Shahood? A. I'm sure Mr. French and Mr. Shahood used those evaluating facts.

Q. Did Mr. French say anything to you about Young Bros. and Mr. Shahood? A. Yes. Prior to Mr. Shahood and Mr. French going through—prior to Mr. Shahood coming in or any of the dealers coming in, the factory has a meeting with its district sales managers, the field sales force, including myself, and gives them their program for the year and gives

us our quotas for the rest of the year and what is expected of us. That, of course, is broken down county by county, district by district really; and then the district manager has to break it down within his own district as to where he is going to pick up this volume of business to make his quota. And when the quotas were given and Mr. Hallday's **[662]** share of our regional quota was given, it was obvious that we did have to enlarge, if possible, we had to make the effort to enlarge our sales in San Francisco County, which is such a big part of our marketplace. Unit wise I think your chart will show what the industry sells to dealers in San Francisco County—1965, 16,739 units. That was a big share of the business done in Mr. Hallday's district. So we did definitely decide to try to get Young Bros. to become a dealer. And at that point obviously, since Mr. Shahood has made the comment he has, we had to tell Lee French that this decision was made; and with my supervisor, Ray Steiner, to try to get Young Bros. to become a dealer; and we were going to, when we had our local show, invite Young Bros. in.

Q. Was this communicated, this decision, to Mr. French? A. Mr. French said that in all fairness to Mr. Shahood, you know how volatile he is and how strongly he feels about this—I'd like to have him evaluate what Sylvania has to offer for the fall before this, if you will, disturbing information is given to him. I said only on the basis that we would do, as we have promised to do when Mr. Shahood told me he would not do business with us if we put on Young

Bros.—I said, well you [663] will know about it before we put him on, but you are certainly not going to keep us from putting him on. So we demurred to Mr. French's judgment that Mr. Shahood should be given the right, indeed, to see what it was he was evaluating if he decided to go ahead with his feeling and his promise to eliminate Sylvania. We wanted him to know what he was eliminating, and so we did not tell Mr. Shahood until after he had seen the whole presentation and had decided how much he would project, which was a quarter of a million dollars.

(Continued on next page).

[664] Q. Now, did you meet with Mr. Shahood after he had—— A. Once that was done.

Q. —written up the order? A. Mr. French and I asked Mr. Shahood to come up to my suite in the hotel where we were having this meeting so that we could tell him indeed that before he placed this order and before it became an order in fact that we had decided to put on Young Brothers. At that point—and he is a very volatile man, he lost his temper. But as I remember, the first thing he said was "Well, at least I got to hand it to you. You said you would tell me and you did." From that point on, Mr. Shahood from that day to yesterday, has not talked to me. So I gather that he really felt very strongly about it. He definitely told Lee French in my presence to cancel the order that he had written.

Q. Did he—— A. And said to me "You have just made me the biggest Philco dealer in the United States." And he was on his way to the Philco con-

vention and we knew he had a Philco store in Sacramento. That was no surprise. But his decision was evidently made up to cut back on Sylvania and emphasize Philco.

Q. That is your understanding of the words that you [665] just testified Mr. Shahood said? A. That is correct.

Q. Now, sir, Mr. Shahood was doing a substantial volume of sales with Sylvania at the time this decision was made, was he not? A. That is correct.

Q. Why did you make the decision to try and franchise Young Brothers when it endangered the relationship with Mr. Shahood? A. Well, our whole philosophy of distribution is based on conviction, if you will. As a matter of fact, I think I have a evangelical fervor for the fact that compatible distribution in a large metropolitan market is desirable and is good and must be a part of our distribution policy. One of the factors that made it important to me to put on Young Brothers, in addition to the figures which we have already gone over, is that we had to have more distribution in San Francisco County. And then too with Mr. Shahood telling me not to put it on, it would be a factor which is certainly if there were some kind of a case—if Young Brothers were not put on and they were to come to the course and we were not put on because Continental TV told Sylvania not to put them on, that certainly is illegal.

[666] Q. Anyway, that is why you were worried about it? A. I was told that was certainly not a situation to get into.

Q. What were the factors as far as the Elbow Room policy is concerned which you considered in making the decision or participating in the decision to offer Young Brothers a franchise? A. Well, the factors, number one, Young Brothers was the largest individual retailer of television in San Francisco county. So it certainly qualified from a size standpoint. His location in the heart of Mission Street was a place where we wanted to have coverage so that consumers could get the merchandise. I believe Redlicks had indicated they were out of our picture by that point. Redlicks was another Mission Street dealer. The preliminary credit investigation by our credit department, which is a normal procedure for prospects indicated that they could indeed give Young Brothers the kind of credit clearance that would make it possible for us to do business, and the Young Brothers attitude in a preliminary discussion with Jay Hallday and myself was such that we felt they were growth oriented, too.

Q. Did you consider the Young Brothers Geary Street store as being in the same trade area with the Geary Street **[667]** of Continental? A. Plus it is in the same county. But my feeling was that Continental TV's store on Geary Street was actually in a automobile area, not in the, if you will, shopping trade area, and Continental TV's approach to the market was rather than people coming into the store, the biggest share of their business, according to what Mr. Shahood told me, was being done by the outside salesmen who went to the consumer's home and sold

them in the home. Therefore, the type of customers who were coming into the stores and shopping would not be the same on a large percentage basis between Geary Street Young Brothers and Geary Street Continental. So there would not be too much conflict. To the contrary, this would be additional opportunity for Sylvania sales to be made and for consumers to see and buy Sylvania.

Q. Did you hope that Mr. Shahood and Continental TV would continue to do business notwithstanding the decision? A. I certainly did. That was my firm desire.

Q. Incidentally, as part of the Elbow Room policy, as I understand it, did Mr. Shahood have the right to cease doing business with Sylvania if he didn't like your decision to put on Young Brothers? A. Very definitely.

Q. Did he have the right, as far as you knew, to tell **[668]** you that if you put Young Brothers on in San Francisco "I am going to pull out of San Francisco"? A. That is his privilege.

Q. His privilege as far as you know? A. We would do nothing, sir, to circumvent that privilege. If that is a good word.

Q. You said you had not had a personal dealing with Mr. Shahood in the ensuing five years? A. It was not my choice. When we came back from the June convention, Mr. French informed me, I understood from Mr. French at Mr. Shahood's request, that I would not be welcome in any of his stores and that he had instructed his employees that if I were to come

in I should be asked to leave. In that kind of a situation where our experience with Mr. Shahood was such that I recognized that he appreciated respect for his opinions and such, I wanted Mr. French to try to bring him around to the position where he would again be interested in being a strong Sylvania compatible Elbow Room dealer. So I stayed away.

Q. As far as you know, did Continental TV continue to sell Sylvania products in San Francisco? A. It was my information that he did not. I had every reason to believe, since he said he wouldn't, and we **[669]** did franchise at that later date in July, as a matter of fact, we did franchise Young Brothers. I think we signed them up at the end of June and the first shipments were in July. Mr. Shahood is a man of his word, so I imagine he pulled Sylvania out of San Francisco. But I didn't go in to see him personally because I was invited to stay out.

* * *

[685] * * * Q. Now, in 1964-1965, Mr. Carroll, how many dealers did you have in San Francisco who were selling in volume to consumers located in Sacramento? A. In volume?

Q. Yes sir. A. Wasn't any.

Q. What? A. Wouldn't have been any.

Q. How many such dealers did you have in San Jose—— A. Selling in volume—complete the question, please. How many dealers did we have in San Jose?

Q. How many dealers did you have in San Jose, Mr. Carroll—— A. I believe——

Q. Wait a minute. A. Oh.

Q. ——selling in volume from their locations in San Jose to consumers located in Sacramento? A. There wouldn't have been any.

Q. Would your answer be the same if I asked about dealers selling in volume from Oakland? A. Certainly.

Q. Sir? **[686]** A. Certainly.

Q. Berkeley? A. Correct.

Q. Vallejo? A. That's correct.

Q. As a matter of fact, Mr. Carroll, as a man with some years experience in this industry, is it not true that this is simply not economically practical for a dealer located more than 25 or 35 miles away from his market to sell and service television products to that market? A. There are successful dealers that go as far as 50 miles. I would say the average dealer does the majority of his business within 30 miles.

Q. Right. A. Radius of his market.

Q. And that's a pretty well known fact in the industry, is it not? A. I would say so.

* * *

Testimony of Calvin Savage

[749] * * * Q. Sometime after the Chicago convention in June of 1965, did you have personal knowledge as to the possibility that Continental would enter the Sacramento market? A. Yes, I had some knowledge of it.

Q. When did you first hear about that? A. I believe the first that I heard about it was, I guess, right after the return from the June convention.

Q. And who did you hear this from? A. From Mr. Shahood.

Q. Now, did Mr. French continue to call on the Continental chain of stores after this June convention? A. Yes, he did.

Q. Was he calling on the chain as frequently as he had prior to the convention? A. No, I don't think so. There just seemed to be a little bit of coldness or a little bit of gradual getting away, you know, the visits were less frequent.

Q. Did you ever talk to Mr. French after June of 1965 on any of these visits that he did make to Stevens Creek? **[750]** A. Yes, I did.

Q. And on these occasions did the subject of Sacramento ever arise in your discussions with Mr. French? A. It certainly did.

Q. I'd like to focus if I can on August of 1965, and ask you if Mr. French was ever at the Stevens Creek store to your knowledge during that month? A. During August, 1965?

Q. Yes. A. Yes.

Q. Do you recall any discussions with Mr. French during August of 1965? A. Well, I had some personal conversations with him as well as some of the other employees.

Q. Well, prior to that month did you say you had some discussions with French concerning the subject of Sacramento? A. Yes.

Q. Would you tell me about that? A. Well, the conversations were around the fact that following the June convention, why, there just seemed to be a subject matter just about everytime that Mr. French came to the store.

Q. What was that, sir? A. About the possibility that we were going to open **[751]** a branch location in the Sacramento area and in Sacramento.

Q. What was Mr. French's reaction as far as you could describe it to us? A. I would say he was a little bit disturbed about it.

Q. Did he say anything that would indicate why he was disturbed? A. Well, at first he just said, you know, "I don't think that this—I don't think that we should—Mr. Shahood should do this, you know, without first getting approval from Sylvania before he goes in there; that he would have to get some approval."

Q. Mr. French told you that? A. Yes.

Q. And did you have this type of discussion with him more than one time? A. Oh, yes.

Q. Would you say it was a frequent subject of discussion during the summer? A. All through the summer, all through his visits there, yes.

Q. I'd like to focus your attention on the month of August, 1965. You have indicated that you had some personal discussions with Mr. French, is that correct? **[752]** A. Yes, that's right.

Q. Where did these discussions take place? A. In the office and their location at Stevens Creek Boulevard in Santa Clara.

Q. Would you tell us about those discussions, please? A. Yes. I recall in one of the conversations

that I had with him personally was that Mr. French said to me, he said,

"Isn't there anything that you fellows can do to convince George, Mr. Shahood, to think twice before he makes this move. After all we don't want to disturb a good relationship.

"We have got a good account here and we don't want to jeopardize the relationship.

"And certainly if you go into Sacramento you are going to disturb this relationship."

Q. Did he tell this to other employees of Continental besides yourself on this occasion? A. Yes, that's right.

Q. Now, did he say anything to indicate to you why the relationship would be jeopardized if Continental went ahead into Sacramento? A. Yes. He did mention, he said that, you know, Sylvania already has an established dealer in the Sacramento **[753]** area there.

Q. Did he mention that dealer's name? A. Handy Andy.

Q. He mentioned Handy Andy? A. Yes. Right.

Q. Did he say anything else about Handy Andy? A. He indicated that he was getting some pressure from his people, Sylvania, to try to prevail on us not to go in there, because apparently Handy Andy was complaining to someone in a higher position back in Batavia and he was getting heat back from Batavia about it.

Q. Mr. French told you that? A. Yes.

* * *

[755] * * * Q. Mr. Savage, have you related to us everything you now can recall about what Mr. French told you about the subject of Sacramento in the month of August, 1965? A. Yes.

Q. Did you have any other further discussions with Mr. French about that subject in September of 1965? A. I recall one particular conversation I had with Mr. French.

Q. Where did that conversation take place? A. At my home.

Q. Were you and Mr. French socially friends at that time? A. I believe that was about the only time that I had met him away from Continental T.V. He was a guest in my home at that particular time.

Q. Okay. Can you to the best of your recollection tell us when in September, 1965 this conversation took place at your home? A. Right around Labor Day.

Q. Labor Day weekend? A. Yes.

Q. Okay. **[756]** Mr. French was there, you were there, were your wives there? A. Yes.

Q. What did Mr. French tell you on that occasion? A. Well, basically discussed again the general subjects that we had talked about before, about business, about going to Sacramento, specifically said to me, you know, he says, "You are really foolish to stick around here with Continental T.V. any longer."

He says, "You know, if they pursue this any further with the idea of going to Sacramento you might just be out of a job." He says, "In fact, all of you will be out of a job." He says, "There won't be any more Continental T.V."

Q. Who was he referring to when he said all of you may be out of a job? A. The other employees of the company.

Q. What was the last part of what he said? A. He said that we might all be out of a job and there wouldn't be any more Continental T.V.

Q. French told you that? A. Yes.

Q. What was your attitude at that time? A. I got damn worried about it, I tell you.

[757] Q. French tell you anything else? A. Yes. He said, you know, "I have known you for the period of time that you have worked here and my personal experience with you," he says, "Your education, your background and I know your work habits," he says, I wouldn't have any problem at all in getting another job. In fact, he says, "I could probably aid and assist you in getting another job and I won't have any problem in getting one for you."

Q. What was your response to that at that time? A. Well, like I said, I was considerably alarmed about it. I said, "Well, you really think"—"You have got me worried now. What can we do about it?"

Q. What did Mr.French respond to that? A. He said, "Well, if you really"—he says, "I will make an appointment for you to look for another job," and he says, "I have got one in mind and I will make an appointment for you if you are interested." I said, "Certainly I am interested in it. I am concerned right now."

Q. All right. At that time did he tell you who he was going to call about a job for you? A. Yes. He

said he was going to set up an appointment for me to go to see the people down at Alco-Paramount.

[758] Q. In San Jose? A. Yes. In San Jose.

Q. To your knowledge, were they competitors of Continental T.V. at that time? A. Yes, they were.

Q. Do you have any knowledge as to whether or not Mr. French carried through about making an appointment for you to see somebody at Alco-Paramount? A. In fact, he did make an appointment for me to go see someone at Alco-Paramount.

Q. How do you know that? A. He called me and told me he had arranged for me to meet with the people at Alco-Paramount about a job.

Q. Did he make an appointment with any specific person at Alco-Paramount for you? A. Yes. Al Lembaratis.

Q. Now, to your knowledge, who was Mr. Lembaratis at that time? A. At that time I don't know what his position was, but I later learned that he was one of the owners of the company.

Q. Did you keep your appointment with Mr. Lembaratis? A. I attempted to keep the appointment. I went down to see him at the appointed time and he was not **[759]** in his office and I never got together with him.

* * *

[782] * * * Q. First I will direct your attention to plaintiff's 66. That is the photocopy of the actual check, is it not, that was sent to John D. Maguire Co.? A. Yes.

[Continued on next page; nothing omitted.]

[783] Mr. Popofsky: Q. The total sum of $60,123.44, September 3, 1965, a Friday? A. Right.

Q. Now, this is the skirt that you have made your entries on, is it not? A. Yes, that's correct.

Q. I think we can take judicial notice—I have a perpetual calendar with me—1965, the Friday next preceding is August 20. A. August 20—I don't know.

Q. Two Fridays next preceding is August 20. Is it not a fact, sir, that any set which is actually sold prior to August 21, 1965, as shown by your own study and which is included on this September 3, 1965 check, would be outside the terms of that agreement with Mr. Lockard? A. It would appear as such.

Q. My notes show 30 of the 45 items bear dates preceding August 21, 1965, Mr. Savage. Would you please review that and see if that would appear to be correct. A. That appears to be correct, yes.

Q. There is one here of 7-24-65. That's July 24, '65, is that not correct? A. Yes, that's right.

[784] Q. Would you not agree with me, sir, just by looking at your own analysis that at least on the September 3rd, 1965 payment that Continental T.V. was not complying with the terms of the SAU agreement? A. There may be some circumstances why a check was not produced prior to September 3rd.

Q. Well, you produced one the preceding Friday, did you not? You have it before you. A. Well, without—I don't have any specific reference back. Well, you pinpointed one item, 7-24-65. This may be or may not be an item which was pending credit from one of our branch stores for which the paper work

did not clear through our office and inventory was not released and the papers processed through the home office before this time.

Q. I thought you just got through telling me that the date sold that you entered on here was the date the set was ready to be released to the consumer. A. It could be that that set was set in the customer's home pending credit approval, which subsequently the credit may not have been approved.

Q. But it was sold, it was out in the customer's hands and it was unpaid for? [785] A. It was off our floor.

Q. You would understand that to be a variation, if not a violation of the understanding with Mr. Lockard, would you not? A. Very remotely.

Q. It is a fact, is it not, that of the 45 items being paid for on September 3, fully 30 are outside the terms of the agreement? A. It would appear.

Q. It would appear to be. I'd like to just direct your attention, if I might, sir, to the check in August. If you look at August 4, please, it is Exhibit 61 and 61-a. They are very similar. It is a check and the schedule with your work papers. Do you have it before you, sir? A. Yes, I do.

Q. Now, the check shows a total of $8,187.40 being transmitted to Maguire, does it not? A. Yes, that's right. The check is $8,187.40.

Q. I'd like you to look at the schedules. There would appear to be 30 items, 20 past the maximum of 13 days provided for by the agreement with Mr.

Lockard. Would you just scan the dates, sir. A. On which schedule, sir? I have 61-A and B.

[786] Q. Try B in particular. A. All right. I recall this particular group of T.V. sets here, namely, 19 P16WH, and these items have a subsequent date, as I have indicated here, date sold reflects the date of sale in May and June of 1965, whereas the check was not prepared until August 4th, 1965. This particular group——

Q. Excuse me. That's some 66 days beyond the terms of your agreement? A. Right. This particular group of television sets is only one of a group of items which was under one of our points of discussion of the discrepancy on the statement for the fact that this was a statement of TV's transshipped to us from another dealer on instruction from Sylvania to us which, as Sylvania and J. P. Maguire have acknowledged, the original documents and papers were lost. And we asked for these documents. We could not pay for them until such time as we had the IBM cards and a trust receipt and an invoice. And upon their discovery that apparently these papers were lost, they produced duplicates and sent them in to us, at such time which we paid for these items. Naturally, they are going to show up here at some 60 days later.

Q. After they have been sold? **[787]** A. After the date they were sold, that's right.

Q. You did mention the first two items. They are not in that class, whatever the situation with that class. They appear to be 15 and 18 days late. A. As you also recall, or as indicated on here from my own

card, card number 4734 SF and 4740 SF is indicative of this particular—these particular items here were located in our San Francisco store operation. And for the lag time of getting the credit approved through finance and the further transmittal of the paper work to Santa Clara would probably account for the time.

Q. But you did tell us as to those two sets that the date sold was the date after the actual sale to the consumer, so these are outside the terms of your agreement with Mr. Lockard, whatever the explanation? A. Yes.

Q. And if you turn to attachment A on August 4 you will find three from San Francisco which are all out of time, and you will find three, the initial three which are not in that class.

Mr. Popofsky: We move the admission into evidece of all of these checks with the supporting attachments.

* * *

(Exhibits 60, 60-A, 61, 61-A, 61-B, 62-A, 63, 63-A, 64, 64-A, 65, 65-A, 66 and 66-A admitted into evidence)

[788] * * * Q. As you look at those instruments in front of you, Mr. Savage, you recall it was part of the term of the Maguire financing plan that when a set was on the floor for a full six months, if it had not been sold it was fully matured? A. Six months from the date of receipt.

Q. As you interpret the six months from the date of shipment is apparently the trust receipts? A. Right.

Q. We have disagreement or discrepancy on that. Let's pass that. Now, sir, it was your understanding, at least at some point at the end of those six months the item had to be paid for? A. That's correct.

Q. Now, during the months of August and September, aside from sets actually sold, did Continental T.V. make any payments whatsoever for matured items? A. Yes, they did.

Q. You have all the checks in front of you, and those all show checks payable for sets actually being sold during the months of August and September. A. They all indicate a date of sale.

Q. Look through them. And subject to verification, they all appear to bear sales dates preceding the dated [789] check? A. Right. That would be correct.

Q. That is correct. So in fact no maturity payments, if I may call them that, were made during the months of August and September, except with respect to sets actually sold, is that not so? A. No. I believe there were sets that matured—that became mature during September that were included on our transmittal, the checks after the 15th of September.

Q. That's correct. The first time that happened, sir, those were in the checks that were sent to the attorney, is that not so? A. That's right.

Q. That's the first time any purported payment was ever at least drawn up in a check item by you for matured items not sold? A. I wouldn't say that was the first time.

Q. In the months of August and September? A. In August and September.

Q. During the months of August and September did you make any renewal payments; that is to say, the type of payment which would be called interest? A. No.

Q. For the 5th and 6th month that Continental T.V. [790] held the merchandise? A. No.

Q. That was at Mr. Shahood's direction, was it not? A. That's correct.

Q. He simply instructed you to cease making renewal payments or interest payments to Maguire? A. That's correct.

Q. You had made interest payments per the Maguire statements earlier, had you not? A. Yes, that's right.

Q. In fact, in June and July you worked out an agreement as to how much renewal payments per the July 1st, 1965 statement should be paid. A. That's right.

Q. And it is your understanding, is it not, that Continental T.V., for whatever reason, just simply ceased making any renewal payments whatsoever to Maguire in the months of August and into September? A. That's right.

Q. Now, with respect to these checks that were sent to counsel for $62,900 worth of merchandise—— A. That's the approximate figure.

Q. You were going through this very procedure with those, were you not? [791] Drawing up a check, working out the attachment based on the date sold, and then transmitting them to Mr. Rudy? A. As of the period of time they matured?

Q. As of the period of time they matured or sold. A. Right.

Q. Now, it was your understanding, was it not, that this total of $62,900 represented the amount of money that was due and owing, or at least payable to Maguire under the system that you had previously been following? A. Yes.

Q. So when Mr. Pedlow and Mr. Rivers were in San Francisco in October and said they thought $96,000 was due and owing, you knew at least $62,900 was due and owing and not paid. You knew that, is that not so? A. Yes.

Q. So the difference between Continental T.V.'s records on the one hand, and the Sylvania-Maguire records on the other was approximately $34,000 in dispute, apparently? A. Somewhere in the vicinity.

Q. Somewhere in the vicinity. You knew these checks that were being sent to the attorneys were not being transmitted on Sylvania-Maguire. [792] You knew that? A. That was my understanding.

Q. You understood that when Mr. Pedlow and Mr. Rivers were out of here in early October for this floor check? A. That's correct.

Q. And you knew that these checks that were sent to the attorney were not certified? You hadn't certified them? A. No.

Q. You had no reason to think they were certified? A. No reason to certify them.

Q. So you know that if for any reason someone wanted to withdraw the funds upon which those checks were drawn, then the checks wouldn't be worth

anything. You knew that, didn't you? A. I wouldn't have any way of concerning myself with it.

Q. Not your problem at all? A. That's correct.

Q. It is a fact, is it not, that the decision to send these checks to the attorneys, that was also at Mr. Shahood's direction? A. That's his direction, yes.

Testimony of Kenneth C. Lopolito

[891] Q. Based upon your experience, however, is it not a fact that it was not uncommon for very large volume dealers to take as long as 10 to 14 days to make SAU payments under the Maguire plan? A. Are you speaking of the experience to that point in time?

Q. Yes, sir. A. Well, I only really had the two large volume accounts, perhaps three, and if the pattern is correct, it would take—we would ask for a weekly payment from all of these people.

Q. But Mr. Anderson would commonly take more than a week, for instance? A. Well, sir, I can only guess, as I say, to the three times a month, or the every 10 days or so, which would be more then.

Q. The largest dealers you had in 1965 were Handy Andy and Continental T.V.; isn't that correct? A. Yes, sir.

* * *

[906] Q. All right. Now, under Sylvania's policies, who represents the Maguire plan to prospective

dealers? Is it somebody in the credit department or somebody in the sales department? A. I think under circumstances as they existed at that time, I think everyone represented. But it was the credit department's duty to represent the Maguire plan as well as the John P. Maguire people themselves.

Q. Did you have any knowledge as to how the Maguire plan was presented to Continental T.V., sir? A. Only in what I have heard. I was not there at the time.

Q. So your information is all after the fact? A. Yes, it is.

Q. Now, did you know that in 1964 and in 1965 the District Sales Managers for Sylvania were representing the terms of the Maguire plan to prospective dealers? A. I don't know that for a fact, but I know that our salesmen continue to do this today.

Q. Have you ever seen the sales manual and check list which explains to them the manner in which to outline the terms to the dealer? A. I think I know what you are referring to, but I am not specifically sure.

Q. Let me show you Exhibit G, Mr. Lopolito, which is [907] several pages from the Sylvania operation manual followed by District Sales Managers, and refer you to the second page of that document, and particularly this language in the middle of the page:

> "Outline it in this manner: 1. With this plan Sylvania finances their product in the dealer's store for 4 months free."

Turning over to the next to the last page at the bottom of that paragraph:

> "This plan allows the dealer to display and inventory the Sylvania line for a 120 day period with no extra charges."

Now, my question, Mr. Lopolito, is in 1965 did you realize, sir, that the Sylvania salesmen were making the representations contained in that language to prospective dealers for the Maguire plan? A. I realized until—I realized it, and at that time I had many meetings with our salesmen trying to advise them that we in the credit department tried to administer the credit, and this particular point pertained to credit in that it was incorrect if they were passing on this information.

Q. When is the first time in 1965 that you so advised a salesman A. I do not recall.

Q. When is the first time in 1965 that you so advised [908] Mr. French? A. Again, I do not recall. After April.

Q. As a matter of fact, you don't have any personal knowledge as to whether or not Mr. French represented what this manual says to Mr. Shahood, for instance, when Continental accepted the Maguire plan A. No, sir, I do not.

* * *

[953] * * * Q. All right. Now, did you attend a credit meeting at the Chicago convention, sir? A. Yes.

Q. And was Continental T.V. discussed among other things at that credit meeting? A. Are you

referring to a meeting without Continental T.V. in attendance?

Q. Yes, sir. A. Mr. Miller, I had discussions about Continental T.V. while in Chicago, prior to the meeting, that Mr. Shahood attended, but specifically I do not remember any meeting or any real discussion other than in generalities.

Q. All right, sir. Let's get to the meeting at which Mr. Shahood was present and I think you were present, correct? A. Yes, sir.

Q. Mr. Lockard, the controller of the company, was he there? A. Yes, sir.

Q. And Mr. Rivers? A. Yes.

Q. Mr. Callahan? A. Yes, he was.

Q. Mr. Carroll, the sales manager? [954] A. Yes.

Q. Was Mr. French there? A. I thought he was if my memory serves me correctly.

Q. Generally, what was the purpose of this meeting? A. As I remember, the purpose of the meeting was to clarify Sylvania's situation with Continental and Continental's situation with Sylvania.

Q. That is right. Now, one of the things that needed clarification at that time was the fact that Continental was attempting to straighten out its credit difficulties that it felt it was having by calling the national people in Batavia directly, as you previously stated. A. That was talked about at the meeting.

Q. And Mr. Shahood on behalf of Continental T.V. agreed at the meeting to henceforth channel all communications through your Los Angeles office, did he not? A. Yes, sir.

Q. What else happened at that meeting? A. They established that Continental would start using the lock box. There was a matter, I believe, of a double shipment of television products and Mr. Shahood of Continental T.V. was granted an extension of time to pay the maturities on that.

Q. Who granted that, sir? [955] A. It must have been Mr. Lockard. He was conducting the meeting.

Q. And when were those sets becoming matured? A. I don't remember when they originally were matured. They could have been matured at the time of the meeting. I can remember the payment dates that were set up for the extensions.

Q. Okay. So, let's see if I can review this just briefly. Mr. Shahood agreed to work through your Los Angeles office, right? A. Yes, he had.

Q. Mr. Lockard gave an extension to certain color T.V. merchandise? A. Yes.

Q. Mr. Shahood also agreed to use the lock box? A. Right.

Q. In San Francisco? A. Yes.

Q. Was Continental's performance under the Maquire plan discussed, that is, matured payments, SAU payments? A. Well, I don't specifically remember. I know there is a followup letter that outlines many of these things.

Q. Let me show you that. [956] Exhibit B-G is a June 21, 1965 letter with a cover letter from Mr. Lockard to Mr. Shahood containing attached to it a letter of the same date from Mr. Lockard to Mr.

Pedlow; Mr. Pedlow being the vice-president and Maguire. A. Yes.

Q. Have you had a chance to review yourself by reading that letter in the last two or three days?

A. No. But within the last month or so I think I have seen this letter.

Q. All right, sir. Let's go to the cover letter, that is, the one from Mr. Lockard, the controller of the company to Mr. Shahood.

He says:

"I am attaching a copy of my letter to Don Pedlow in which I summarized our Chicago discussion.

"If you have any questions regarding the items I have enumerated, I would appreciate your bringing them to my personal attention so that they can be resolved and that we can turn this problem back to the local representatives of Sylvania and Maguire for continued action.

"It was a pleasure seeing you in Chicago and when I get out to the Coast again I may just take you up on your offer to play golf at Alemdon.

"Kindest personal regards."

[957] Attached to it is a letter from J. Lee Lock ard to Mr. Don Pedlow.

It says:

"Dear Don:

"This letter will serve to summar[illegible] my understanding of our meeting in Chicago with George Shahood of Continental T.V. I felt it best to get these points in writing while they are still fresh

in my mind for the guidance of both your field auditors and our district credit supervisor, Mr. Ken Lopolito."

Did you receive a copy of this letter, sir? A. Yes, sir.

Q. [Reading] "1. There are approximately 60 color TV sets [Model 21-LC21 CU and 21-LC21 KU] which were billed on a single invoice for which the free-flowing period should be extended by two months from the present maturity date. You will recall that these were sets on which there were some confusion as to whether or not the order was either cancelled or duplicated, but in any event, these sets were shipped and it is Sylvania's desire that an additional two months free-flowing be granted to the account prior to the beginning of any interest or any renewal [958] charge. If you are unable to locate this specific transaction, I am sure that Tom Rivers can furnish the invoice number."

Let me ask you first, sir, as a matter of fact, Maguire Company did not pick up these extensions and reflect them on their payments, isn't that a fact? A. Not the first month. I believe they did after the first month.

Q. You think they did in July? A. Could have been July or August. But I know they skipped a month.

Q. Do you recall that it was September, September 22, before Borg-Warner Acceptance Company picked up the extensions given by Mr. Lockard here

in June? A. It could have been immaterial, because since the extensions were given, the only thing it shows is on a piece of paper——

Q. And Sylvania, of course, didn't expect—— A. Continental was not being asked to pay for that except by the agreement.

Q. But yet you would agree that if these extensions, as I say, were not picked up until late September that each of those monthly statements from Maguire until it was picked up in late September would show an erroneous service charge for those categories of sets? [959] A. Asked that way, yes.

Q. And would also show an erroneous pay immediately amount attributable to those sets? A. If we are talking after the six months period of time, Mr. Miller, yes, it would.

Q. Now, sir, Page 2 of this seems to be an agreement concerning some maturities, some other maturities.

> "2. All maturities which would normally have been payable on the date of the last audit [the ill-fated June 1] are payable on June 22, and I have allowed Mr. Shahood until July 22 to make payment for any maturities that arise after June 1 and prior to July 22. In the future all maturities are due on the date that the trust receipts do mature, but I would not be overly concerned if such maturities were included in the check which is prepared and mailed on the following Friday."

So if I understand that paragraph, Mr. Lopolito, —and you were present at that meeting when this agreement was arrived at, correct? A. Yes.

Q. So Mr. Lopolito said:

> "In addition to extending maturities on those 200 sets or how ever many there were, 60 sets, we are also going to allow you to [960] pay maturities one time on June 22 for all maturities now due;" correct?

A. Correct. You said Mr. Lopolito but you mean Mr. Lockard.

Q. I am sorry, Mr. Lockard. In other words, all maturities now due at the time of our credit meeting will be payable June 22. A. Yes.

Q. And any maturities arising from the first of June to July 22 will be paid on July 22; is that what he says? A. Yes, he does.

Q. So you knew at that time to expect only two maturity payments from Continental T.V., one in June and one in July, until the month of August; isn't that right? A. Yes, as I remember it.

Q. That was the agreement, correct? A. Correct.

Q. Okay. He says:

> "We agree, as a convenience to Continental T.V., that J. P. Maguire would not schedule audits on a Monday or Tuesday of any week and if the holiday fell on a Monday an audit would not be set up by Maguire until either Thursday or Friday of that [961] week [if this would be in line with your normal schedule] so as to provide two full working days for Continental T. V. to clear their previous weekend business."

Of course, you were present at this meeting where this was discussed, correct? A. Yes. I think I was

present at the meeting during anything that was discussed in this.

[Continued on next page; nothing omitted.]

[962] Q. Fine. But you did have some knowledge at that time that Maguire had previously agreed to this very thing that Mr. Lockard speaks of here, that is, no field audit the day after a holiday or weekend? A. I am aware of that situation. And, as I pointed out before, I don't know exactly when the first time I found out. I don't recall.

Q. Okay. Next he says:

> "Continental T.V. will begin using the San Francisco lock box depository for all payments to J. P. Maguire and Co. effective immediately."

Now, up to this time Continental had resisted using that lock box, correct? A. Yes, they have.

Q. Next,

> "Mr. Shahood agreed that Continental T.V. will prepare and mail a check each Friday to the San Francisco depository covering all transactions through the preceding Friday. This allows an average of 10 days from date of sale and in some cases might run as high as 13 days. We agreed that so long as Continental T.V. is making payments on each Friday in full for merchandise sold through the preceding Friday that the Maguire auditors need **[963]** not pick up a check to satisfy any SAU condition that has arisen since the second preceding Friday. Example: In the month of July, 1965, sales made between July 10 and July 16 would be payable on July 23. If an audit took place on Wednesday, July 21, settlement for sales made between the 10th and 16th would be expected on July 23 and sales between July 17 and 21—the date of the audit—would normally be expected on Friday, July 30. Should there be any further questions on this item please bring them to my attention for discussions."

Now, what this means, does it not, Mr. Lopolito, that the agreement was made that Continental would pay on a Friday for all sales which have occurred within the last 14 days? A. I believe it was 13.

Q. 13? A. Yes.

Q. So any sale occurring within that 13-day period would be paid on that specific Friday. There was always a two-week, Friday to Friday lag, correct? But it could be as much as that, let me say it that way. A. It could be as much as that.

Q. Correct. **[964]** Now, previous to this agreement in June, what was the payment schedule for SAU's with Continental? A. I believe we asked them to pay us once a week.

Q. But as these reports—these audit reports have indicated, for April, May and June they were taking from nine to twelve or thirteen days typically, weren't they? A. As they indicated, yes.

Q. So this really just formalized pretty much what Continental's habits had been? A. I think it liberalized it, too, in my own personal opinion.

Q. Okay. And Mr. Lockard was the person who granted this agreement, or granted this concession, if you call it that, to Continental on this occasion? A. Yes, sir.

* * *

[965] * * * Q. Mr. Lopolito, I think we broke off talking about the June letter from Mr. Lockard, is that correct? A. Yes, sir.

Q. And Mr. Lockard ends up, after summarizing these arrangements and agreements made with Continental by saying that:

> "There were several other items discussed with Mr. Shahood involving our agreement to extend this credit guide limit to $350,000 to offset the color sets mentioned previously, and this limit applies only to the 'Convention Orders', but does not change the basic credit guide limit of Continental T.V. of $300,000.
>
> "I thought our meeting was a fruitful one and I am asking Mr. Shahood to comment directly to me if there are any points in this letter which do not match up with the discussion we had in Chicago.
>
> "Thank you very much for handling this on the part of J. P. Maguire & Co.
>
> "Kindest personal regards. Mr. Lockard."

[966] Copies sent to Mr. Rivers, yourself, Mr. Lopolito, and Mr. Shahood; correct? A. Yes.

Mr. Miller: Your Honor, we would offer this as claimant's next as marked.

Mr. Popofsky: No objection, Your Honor.

The Court: Admitted.

The Clerk: Exhibit BG introduced and admitted in evidence.

(Claimant's Exhibit B-G marked and received into evidence.)

* * *

[977] * * * Q. You still approved orders after June of 1965 for Continental, didn't you? A. I did that from April to June, before the meeting was held.

Q. Didn't you approve a July order for Continental T.V.? A. Yes.

Q. Didn't you approve an August order for Continental T.V.? A. If there was an order in August, I probably approved it, yes, sir.

Q. Right. And didn't you have the Continental T.V. file folder in your office in Los Angeles during those months? A. Yes. But again Continental T.V. was the only account of an order that I had ever approved that was rejected by Batavia.

Q. That was which order, sir? A. I assume it was the August order. I think maybe the September order.

Q. We'll get to that order in a few moments, Mr. Lopolito. But until the order which you just made reference [978] to, no order placed by Continental T.V. and approved by yourself in Los Angeles had ever been rejected by Batavia. That's a true statement, isn't it? A. The telegram that you showed me earlier, the one from Mr. Rivers——

Q. Hm-hmm. A. ——didn't that refer to an order to be held?

Q. That's right. In other words, an order was held for two or three days until the outstanding balance got paid down to the credit limit. A. And I assume that I processed that order the same way as the later order, so this was not the first time. It happened prior to that time.

Q. That order was not rejected, was it? A. It was for a period of time, Mr. Miller.

Q. Let me rephrase the question, Mr. Lopolito. I am asking you until the order you just made reference to in September or August, 1955, do you have any personal knowledge that any order ever approved for Continental T.V. by yourself was every totally and absolutely rejected and never shipped by Batavia? A. No, sir.

* * *

[981] * * * Q. Did you know Continental's financial condition at that time personally? A. I don't think that I had a true picture of the last or most recent financial situation.

Q. Do you know of anybody in your organization who did know Continental's financial condition as of August of 1965? A. No, sir, I don't.

Q. All right. Now, you recall that in the meeting with Mr. Lockard in Chicago he said that Continental could have until June 22 to pay the maturities then due? A. Yes.

Q. And those maturities were paid as agreed, were they not? A. There was a payment on the 22nd of June or [982] thereabouts.

Q. Yes, sir. A. I think it was the 23rd of June.

Q. And did not Continental T.V. use part of its advertising claim which it had been asking for for several months to take care of that maturity payment? A. Yes, they did.

Q. Let me show you Exhibit B-A, which purports to be a letter of May 21, 1965, from yourself to Mr. Petrick of the Maguire Company. Do you recall seeing that before, sir? A. [Examining] Yes, I wrote it.

Q. All right. You say:

> "Dear Bud: During the last week Sylvania has processed three advertising claims which will be transferred to Continental's Maguire account the first of June. Mr. Shahood is very cognizant of these claims and would like them applied to the $17,000 due in maturities."

Stopping there for a moment, the $17,000, Mr. Lopolito, is again these defective stereo sets we've talked about, correct? A. I believe it is.

Q. Goes on to say—you go on to say:

> "The total credit will amount to $8,184.32, so it will be appreciated if you will deduct this [983] amount when you pick up the check for maturities."

Now, your intent by writing this letter, Mr. Lopolito, was to allow Continental T.V. to use these long-sought advertising credits to help pay the $17,000 maturities, correct? A. Yes.

Mr. Miller: We'll offer this as Plaintiff's next in order, Your Honor, as marked.

* * *

The Clerk: Exhibit B-A introduced and admitted in evidence.

[Letter dated May 21, 1965 from Mr. Lopolito to Mr. Petrick, marked Claimant's Exhibit B-A for identification was received in evidence.]

* * * Q. All right. Now, the next thing that Mr. Lockard said at that meeting at the Convention was that the maturities arising after June 1 should be paid for on July 22; do you recall that? A. Yes, I believe those are the dates.

Q. And as a matter of fact, Continental complied with this agreement and made that payment on July 22, correct? A. They made the payment. I don't know the exact date of it.

Q. Do you recall in making that payment that they [984] offset excise tax due against the payment? A. Yes, there was an excise tax returned to Continental T.V. and they used that as part payment.

Q. All right, sir. Let me show you Exhibits B-J and B-K. Exhibit B-J purports to be a private wire from Mr. Lockard to yourself. Take a moment and review that. A. [Examining] Yes.

Q. All right. He says:

"Continental T.V. will be receiving an excise tax credit in the amount of $19,937.62. The chances are that this will be mailed either tomorrow or early next week and will be a credit to Continental T.V. open account. As you will recall there are certain maturity obligations to be met by Shahood on July 22. Please be prepared

to utilize this credict in settlement of these obligations, as well as collection of any other SAU items."

The wire bears what date?

A. July 8, 1965.

Q. All right, sir. Now, Exhibit B-K is a credit invoice. Have you seen that before? A. [Examining] Well, this is the actual invoice for the excise tax, according to this.

Q. All right. Bears the same date, July 9—I'm sorry, the next day, July 9, 1965, and it is in a sum of [985] $20,031.38, correct? A. Yes, sir.

Q. So that this is the credit invoice granting Continental T.V. Incorporated at $20,000 credit which by agreement was used against the maturity payment on July 22? A. Yes.

Q. Okay. Your Honor, we would offer these two documents as marked as Plaintiff's next.

* * *

The Clerk: Exhibits B-J and B-K introduced and admitted in evidence.

[Telegram from Lockard to Lopolito and credit invoice, marked Claimant's Exhibits B-J and B-K, respectively, for identification, were received in evidence.]

* * * Q. Now, Mr. Lockard never complained to you that Continental was deficient in any way in paying the maturities due on the 22nd of July, did he? A. I don't recall Mr. Lockard talking to me about this subject.

Q. Now, the Maguire field audit was held the last of June, the first day of July, as it was routinely for the months preceding. Do you recall seeing the audit report for [986] June 30-July 1 audit? It's marked D-K. A. [Examining] Yes, I have seen this.

Q. All right, sir. And it indicates "Additional Locations, six." A. Yes.

Q. It indicates $16,303 sold and unpaid at the time of this audit? A. Yes.

Q. And it indicates that the above sold items will be paid July 9 as per agreement in letter dated June 21 by Mr. Lockard, correct? That's what it says. A. That's what it says.

Q. But that's not what the agreement was, was it? A. I don't believe it is.

Q. Okay. Mr. Lockard said we could have until the 22nd. A. No, sir. This is talking about SAU. You're referring to maturities, I believe.

Q. All right. Is there any way you can tell from this document whether any part or all of this $16,000 figure is in fact SAU? A. I have to take the word of the person that signed it, because this is the area that SAU information is supposed to be put on the sheet.

Q. All right, sir. Since it appears under "Sold and [987] unpaid," you are assuming, and for that reason alone, you are assuming that it is all SAU totally, correct? A. Yes.

Q. Okay. At the bottom is says, again the credit section, says "See attached memo," and then there's

one, two, three pages of information concerning specific models, serial numbers and amounts, and it is headed "Items awaiting credit or adjustment."

Now, Mr. Lopolito, by the time you got this exhibit, and again it is D-K, you realized that much of the credit requested on that audit report had been previously requested by Continental T.V.; isn't that a fact? A. In comparing that, there may be some of the same items, yes, sir.

Q. And that situation whereby Continental had been requesting credit for concealed freight damage, that existed to your knowledge for two or three months? A. Some of the items had existed for a period of time.

Q. Right. Do you recall whether you did anything personally to trace these items so that credit could properly be given to Continental T.V.? A. At this time no more than I previously stated, that I know what my own system would be. Whether I followed through with it or not——

Q. All right. Now, sir, here's Exhibit D-L, which [988] is the audit followup to the July 1st audit. Again it is directed to you, correct? A. [Examining] Yes.

Q. "Re Continental T.V. Incorporated; date of audit June 30 and July 1," correct? A. Yes.

Q. Amount of sold items $16,303.61. Does that agree with the amount shown on the field audit report? A. Yes, it does.

Q. Date paid July 12, or eleven days after the audit was complete, correct? A. Yes.

Q. Again, is this in keeping with Continental's usual delay experienced in the past? A. In keeping with the pattern you've been discussing.

Q. Yes. And apparently the pattern that Continental T.V. used to make these payments the last three of four months that we have discussed, correct? A. Yes, sir.

Mr. Miller: We would offer Exhibit D-L and D-K as Plaintiff's next in order as marked, Your Honor.

* * *

The Clerk: Exhibits D-K and D-L introduced and admitted in evidence.

[989] [Audit report and followup, marked Claimant's Exhibits D-K and D-L respectively, for identification, were received in evidence.]

* * * Q. All right, Now, getting into July and August again, Mr. Lopolito, if I may, do you have any recollection as to whether or not Continental had paid its service charges—its interest charges on the Maguire plan that summer? A. I don't believe they had, and I don't re——

Q. Let me show you Exhibit B-L, which is a letter again from yourself to Mr. *La Teer*. Who is Mr. La Teer? A. He was collection manager for John P. Maguire Company, New York.

Q. All right. And you say—this is a letter on July 19, by the way, correct? A. Yes.

Q. "Dear Jack: Enclosed is a check for $468.88 paid on service charges for Continental

T.V. The breakdown is on the check and should be applied as follows,"

et cetera et cetera. You end up by saying:

"This should total the current renewal charges due of $1,392.29."

So by the date of this letter at least, July 19, it is clear, is it not, Mr. Lopolito, that Continental T.V. was current on its renewal charges on the Maguire plan?

[990] A. Excuse me just a moment, please.

Q. Surely. A. [Examining] We made a settlement here based on those items that were the ones that you were referring to for damage, and we did not charge them any renewal charge for the damaged goods, therefore reduced the $1392 figure to the $468, I believe.

Q. Yes. And by July 19, Continental T.V. was current on their interest charges, correct? A. Based on this letter it would be correct.

Q. Thank you, sir. We would offer Exhibit B-L as Plaintiff's next in order as marked.

* * *

The Clerk: B-L introduced and admitted in evidence.

[Letter from Lopolito to LaTeer, marked Claimant's Exhibit B-L for identification, was received in evidence.]

* * * Q. All right. Now, Mr. Lopolito, we have alluded to a July order. Do you recall that Continen-

tal T.V. placed through Salesman French an order in July for Sylvania merchandise? A. Was this $16,000 or $63,000?

Q. $63,658. [991] A. I remember the sixty-three thousand dollar——

Q. All right. Exhibit P. Let me show you the order, sir. Did Mr. French transmit that order routinely to you in Los Angeles, sir? A. I can't say, Mr. Miller. I see no place on this order that I have made any notation that would indicate that the order was channeled through Los Angeles via Batavia.

Q. Let me refresh your recollection, sir, on Page 167 of your deposition, line 6:

> "Q. You sent the order just to the customer service department. Now, the July 3rd order was given a credit approval number and submitted, and you did all that you customarily do with respect to that order?
>
> "A. Yes, sir.
>
> "Q. Was there any thought given by you to not approving that order?
>
> "A. No, sir.
>
> "Q. All right. Do you know whether or not that order was shipped?
>
> "A. I believe it was shipped."

Now, does that help refresh you, sir, that the July 3rd order was in fact received and given a credit approval number by yourself and sent on to Batavia for shipment?

A. No, it doesn't. Again I generally put a stamp [992] and initial on any order. I do not find it on

here. Now, back in 1966, if I remember it as going through my office, then perhaps it did, but——

Q. Well, I assume your recollection of this event would be better in '66 than it would be today? A. Obviously.

Q. All right. You have no recollection today about disapproving the July 23 order, do you? A. No, I don't.

Q. This is July 3, was it? A. That's dated March —rather June 20.

Q. June 20. Okay. It was submitted I think early the first week in July. So as far as you know, as you sit here, your deposition testimony is correct and you did approve the July 3rd order and it was sent to Batavia routinely, was it not? A. Yes.

Q. Okay. Now of course by early August or late July you had had this discussion with Mr. Shahood and had learned that he had a specific location in Sacramento? A. I do not recall the dates.

Q. Well, by August 4th Mr. Rivers is writing a letter to Mr. Lockard telling him about a discussion with you—— A. Yes.

Q. ——correct? We just reviewed that letter. [993] A. It was the end of July.

Q. So the end of July you learned I suppose for the first time from Mr. Shahood that he's got a specific location for his new store. A. I think so.

Q. Now, before we get to Sacramento, Mr. Lopolito, after the June convention did you call on Continental chain of stores personally? A. I was in the stores after the June convention.

Q. Okay. A. At least one time.

Q. Do you recall any discussions you may have had on that visit, or if there was more than one on the second visit, as to extending certain merchandise on the Maguire plan? A. I really do not remember specifically. I know that I did it and I don't know exactly or remember exactly what I was talking about at that time.

Q. You discussed that subject, however, with Mr. Savage of Continental T.V., you recall that? A. No, I do not at this time.

Q. Now, let me see if this refreshes you. On Page 173 starting on Line 6.

"Q. Do you recall when this meeting was? Was it in July?

"A. I don't remember. It was during the summer [994] after the June convention, but I don't remember exactly when it was.

"Q. You had a meeting in Mr. Shahood's office with he and Mr. Savage?

"A. Yes. I remember him calling Mr. Savage into his office.

"Q. What did you discuss at this meeting at that time?

"A. It was probably maturities and SAU problems. Specifically I don't remember.

"Q. What was the nature of any problems that you recall at that time?

"A. I do not recall the exact nature of the problems.

"Q. In fact, they were paying SAU's every Friday, were they not?

"A. As far as I recall they were.

"Q. Now, you discussed extensions of certain trust receipts with Mr. Savage at that meeting, didn't you?

"A. At one time if that was the meeting, yes, I did discuss with Mr. Savage about extensions.

"Q. And he had a list of certain trust receipts that he made up?

"A. Yes.

"Q. And you went through this list and you checked off various items on the list on these trust receipts?

"A. I did something something similar. Exactly what [995] I did I do not recall but I remember the incident, yes.

"Q. What is the reason for doing this at this time, do you recall?

"A. They had asked me for some extra time and I believe that I granted it. I don't remember the specific reason why they asked me. It wasn't an unreasonable request.

"Q. They asked you for a certain extension of time and you gave it to them?

"A. Yes.

"Q. Do you recall what amount of time this was?

"A. No, I don't. Might have been two weeks but I am not sure."

Q. Now, does this help refresh your recollection, Mr. Lopolito, that in fact sometime after the June convention you did extend certain sets under the flooring terms? A. I remember from your reading

to me, but at this time I really have no recollection of exactly what we talked about at that time.

Q. I take it you don't have any personal knowledge that the deposition testimony under oath is incorrect? A. Shouldn't be incorrect.

Q. All right, sir. Now, is it not a fact, sir, that after the June convention Continental's payment habits were better, not worse, but better than they had been prior to the convention? [996] A. I believe I stated that in my deposition that they were regularly paid. There was a regular check on Friday.

Q. But I am asking generally, sir, isn't it a fact that Continental's payment habits were better after the convention to October than they had been prior to the convention? A. They used the lock box after the convention?

Q. Yes. A. And again, as they—as I recall, they made a payment each Friday. Now, that is better than it was, because as you have noted earlier, they were running ten, eleven, twelve days from between the date of the audit and the time of the payment being made. So that would have been better, yes.

Q. So generally speaking that statement is a fact, is it not? A. Yes, sir.

Q. Now, do you recall that Continental T.V. appeared on any of the delinquency reports in July? A. What delinquency reports are you referring to?

Q. Let me show them to you. Marked as B-M is a quarterly report of accounts over ten days past due, your area, Area 34. A. Yes.

[997] Q. To Mr. Rivers in Batavia and it is from your Los Angeles office. A. Yes.

Q. Signed by yourself. A. Yes.

Q. All right. The date on that report is what, sir? A. July 12, 1965.

Q. And the purpose of that report is to reflect delinquent accounts as of that date? A. Yes, sir.

Q. Is Continental T.V. on that report? A. It wouldn't be because of the June meeting where we gave them the extension until the second of July.

Q. I take it your answer is—— A. They are not.

Q. Let me show you Exhibit D-N dated what, sir? A. July 13.

Q. To Mr. Rivers. A. Yes, sir.

Q. From yourself? A. Yes.

Q. Entitled "Past Due accounts." A. Yes.

Q. Area 34. That is your area? [998] A. Yes, it is.

Q. That is also the Northern California area? A. Yes.

Q. Is Continental T.V. on that report? A. They are not.

Q. Let me show you Exhibit B-O. The report is "Accounts with balances in excess of $10,000, Area 34." The date of that report is July 19, 1965. Again you prepared this for Mr. Rivers? A. Yes, sir.

Q. And it purports to only show outstanding balances without regard to how much if any is due at the moment, correct? A. That is correct.

Q. Continental T.V. is shown with a balance due of how much, sir? A. $224,635.83.

Q. The credit rating obtained from Dun & Bradstreet is unchanged from the previous report, correct? A. That is correct.

Q. The financial statement is shown last as June 1964. A. Yes.

Q. That is unchanged. A. I think the other one we looked at was January of '64. I would have to look at that.

Q. What does it say in the comment section about **[999]** Continental T.V.? A. It says, "Large volume account, $25,000 paid by 7-15."

Q. Now, let me show you Exhibit B-B. Do you recall this report? Take a moment and look at it, please. A. This is the SAU report that was made up by John P. Maguire Company.

Q. It is not on a national basis? A. National weekly.

Q. Does it incorporate the Northern California area? A. It would have been included or it should have been included.

Q. What is the date on that report? A. July 28, 1965.

[Continued on next page; nothing omitted.]

[1000] Q. Would you look through it, please, and tell me if Continental T.V. appears on it. A. No, sir, they do not.

Mr. Miller: Your Honor, I would like these four documents offered as claimant's next as marked.

* * *

The Clerk: Exhibits BP, BO, BM, BN introduced and admitted in evidence.

(Claimant's Exhibits BP, BO, BN and BM marked and received in evidence.)

* * *

[1003] * * * Q. Let me show you three August reports. The first is BR. It purports to be a report of accounts with balances in excess of $2,000 90 days past-due, for Northern California area 34; correct? A. Yes, sir.

Q. What date does it bear? A. August 13, 1965.

Q. Prepared by yourself? A. Yes.

Q. Is Continental T.V. listed on this report? A. No, sir.

Q. Let me show you Exhibit BS, accounts with balances in excess of $10,000, area 34, again prepared by yourself. A. Yes.

Q. And the date, sir? A. August 13, 1965.

Q. Sent to Botavia? A. Yes.

Q. And it lists Continental, correct, and Handy Andy? What is the outstanding balance as of August 13 for **[1004]** Continental T.V.? A. $174,035.

Q. And still it has the same credit rating for Continental T.V. as the previous report. A. Yes, I believe it does.

Q. And that's the same financial statement date as the previous report? A. Yes.

Q. All right, sir. Lastly, let me show you Exhibit BT and again it is an SAU report, delinquent SAU dealer. A. Yes.

Q. And what's the date on that report? A. August 26, 1965.

Q. And that report was prepared by Maguire Company? A. Yes.

Q. Would you look through it, please, and see if Continental T.V. is on it. A. No, sir.

Mr. Miller: I would offer these three as Claimant's next marked BT, BS and BR, please.

* * *

The Clerk: Exhibits BR, BS and BT introduced and admitted in evidence.

[1005] (Claimant's Exhibits BR, BS and BT marked and received in evidence)

* * * Q. Of course, also, Mr. Lopolito, there was an August field audit report by the Maguire Company, correct? A. Should have been.

Q. Let me show you Exhibit BN which is the August 5 and August 6 field audit report on Continental T.V. and its affiliated stores, correct? A. Yes.

Q. And it shows $14,179 sold and unpaid, correct? A. Yes.

Q. Now, in the comments section it says:

"Payment of $8,187 will be paid on check No. 2338 dated August 6, 1965. Mr. Shahood was in El Paso, Texas and could not sign checks. Payment will be mailed on his return August 9, 1965. The remaining sold items of $5991 to be paid to JPM on August 13. These items were sold in the last two days."

All right. At the bottom of the page it says:

"Refer to my report of July 1, 1965, listing all items which were freight claimed. Dealer waiting for credit."

Then there is one additional item here in which [1006] Mr. Petrick says:

"Dealer did not receive this item. Credit should be issued dealer by JPM."

It is signed by Mr. Petrick. A. Yes.

Q. So apparently by August of 1965, Continental T.V. had still not received this freight damage credit; is that correct, Mr. Lopolito? A. If that is what appears in this memo. Are you referring to the 21 items?

Q. Yes. Now, let me show you Exhibit BO which is the follow-up memo from yourself to Ken Lopolito respecting this August audit amount of sold items of $14,179. Does that agree with the amount shown on the audit? A. Yes.

Q. Date paid: August 25 or 20 days after the audit date? A. Yes.

Q. Of course, there is a note on the audit that Mr. Shahood was out of town, correct? A. Yes, there is.

Q. Out of the state? A. Yes.

[1007] Q. Now, did you personally complain to Continental T.V. about the delay of 20 days in payment of this item of $14,000 late in August? A. You mean after I received the payment or prior to receiving the payment?

Q. After you received Exhibit BO which notified you that the payment was 20 days after the audit. A. I do not recall.

(Continued on next page.)

[1008] Q. Do you recall whether anybody in Sylvania complained about the delay late in August

on this payment? A. I would not necessarily be made aware of any conversation between someone in Sylvania and Mr. Shahood's office.

Q. I understand that, but do you have any personal knowledge as to any such complaint? A. No, sir, I do not.

Q. The same answer, if I asked you about complaints by the Maguire Company? A. I have no recollection of any.

Q. All right, sir. We would offer these as Claimant's next in order, Your Honor, as marked, DN and DO.

* * *

The Clerk: Exhibits DN and DO introduced and admitted in evidence.

(Claimant's Exhibits DN and DO marked and received in evidence)

* * * Q. Now, Mr. Lopolito, on August 27 an order was placed by Continental T.V. routinely through Mr. French, the salesman, and that order was transmitted to your office in Los Angeles for credit approval. Let me show you that order, Exhibit R. **[1009]** Do you recall receiving that order, sir? A. No, sir.

I do not specifically recall receiving the order.

Q. Okay. I refer you, sir, to refresh your recollection, page 181, your deposition at page—at line 6:

"All right. Now, on or about August 27, you approved an order for approximately $116,000 worth of merchandise to Continental?

"A. I approved an order, yes."

Down at the bottom of page, starting at line 26:

"Q. Did you in fact send the August 27 order to Mr. Steiner?"

Page 182:

"A. Yes. I believe I did.

"Q. This would not be customary, would it?

"A. He is a member of the sales department, so he would have access to it.

"Q. Prior to that date had you ever sent any order directly to Ray Steiner or any customer?

"A. Not that I recall."

Now, does that help refresh you, Mr. Lopolito, that this was an order that had to be approved by Mr. Steiner as to mix, and that you were notified that you were to send **[1010]** the order on after approval directly to Mr. Steiner? A. I remember the incident, but also all of our orders are approved for mix at the sales department.

Q. All right, sir. But your recollection was at least as good in '66 as it is now, I take it, about this particular order? A. It had to be much better than it is five years later.

Q. So you don't have any reason to now believe that you did not in fact approve the August 27th order, isn't that correct? A. Well, I never disbelieved that I approved it. It was just that I did not recall the incident as you presented it.

* * *

[1012] * * * Q. Now, when is the first time that you knew that a Continental T.V. store was opened and operating in Sacramento with Sylvania merchan-

dise on the floor? A. I do not recall the specific date, but it was as a result of a telephone call from Mr. Hines.

Q. From Mr. Hines? A. Yes.

Q. He is the Sylvania sales manager for the Sacramento area? A. Yes, sir.

Q. Okay. In other words, he is Mr. French's counter part in Sacramento? A. Yes, it would be.

Q. Okay. You got a phone call from Mr. Hines, that was your [1013] first knowledge? A. Yes.

Q. Let me show you, sir, Exhibit T which is Mr. Hines' daily call report for September 7, 1965 signed by Mr. Hines, and the second entry indicates that he made a telephone call to your credit office in Los Angeles and talked to you personally; is that correct? A. Yes.

Q. And the date appearing on this call report is September 7, 1965? A. Yes.

Q. Would that refresh your recollection that was Mr. Hines called and said for the first time that the Continental T.V. had merchandise in Sacramento that it must have been on the 7th of September of 1965? A. Yes.

Q. All right. What did Mr. Hines tell you in that telephone conversation? A. I do not remember the specific conversation at this time, but in essence he said that there was Sylvania merchandise in the new Continental location and asked me about it. And I really recall nothing more about the conversation.

[1014] Q. Well, he told you specifically how many sets were on the floor, did he not? A. He may have, I do not remember now.

Q. Okay.

Page 177 of your deposition, Mr. Lopolito, at line 5:

"Q. When did you first discover that Continental T.V. had Sylvania merchandise in Sacramento?

"A. I don't—I imagine it was when—in September whenever the date was when he opened the store. It was probably the same day or the day after I had a call from Mr. Hines.

"Q. The district sales manager in that territory?

"A. Yes.

"Q. What did Mr. Hines tell you?

"A. He told me that Mr. Shahood had—I believe the number was 35 pieces or something of Sylvania merchandise in the store.

"Q. Why would he tell you this?

"A. I don't know.

"Q. Was he complaining to you about this?

"A. Yes, he was.

"Q. What was his complaint?

"A. The complaint of any salesman, he was worrying about his interest, and his interest was his dealer.

[1015] "Q. His primary interest was Mr. Anderson, was it not?

"A. Yes."

Now, you gave these responses to those questions——

Mr. Popofsky: Your Honor, may I request the next question and answer be read, if counsel please?

Mr. Miller: Certainly.

"Q. Did he mention Mr. Anderson during this conversation?

"A. I don't remember him mentioning him; no."

Mr. Popofsky: Thank you.

Mr. Miller: Q. Now, did you give those responses under oath, sir, to those questions, back in 1966? A. Yes, I did.

Q. All right. Does that help refresh your recollection, Mr. Lopolito, as to the substance of some of the conversation with Mr. Hines? A. Yes.

Q. Now, did not Mr. Hines also say to you in substance, isn't there some credit reason that we can use to prevent Continental from keeping that merchandise in Sacramento? A. I don't recall him saying anything like that.

Q. Let me show you Exhibit T again, sir, which [1016] is Mr. Hines' call report that I have showed you previously. And under the comment section, opposite the telephone notation made to you in Los Angeles, he spoke to you one quarter of one hour, and he has a notation that says, and you can follow it here, if you would, "Called Ken to see if he could keep merchandise out of Sacramento on grounds it was out of trust." Do you see that? A. Yes, I see it.

Q. Does that refresh your recollection as to a part of this conversation with Mr. Hines about Sacramento? A. No, Mr. Miller, because I had read this before you came back to me, and I did not remember

my direct conversation with Mr. Hines concerning what the point you have just made.

Q. All right. Mr. Hines was unhappy when he called you, was he not? A. Yes, I would say that he was.

Q. And you picked up the implication that he was unhappy because of the relationship he had with his existing dealer up there? A. Yes, I think you could say that.

Q. All right. And you knew that existing dealer was Handy Andy, [1017] didn't you? A. Yes.

Q. Now, how did you respond to Mr. Hines? A. You mean what did I tell Mr. Hines?

Q. Yes, sir. A. I really do not know, unless you have read something to me, but I don't think that I told him anything. I don't really feel that there was anything that I could have said to him then or even now. There was nothing that I could do. I know I did make a phone call to Mr. Rivers.

Q. All right. Page 178, line 8:

"What did you say you would do for him, if anything?

"A. I don't recall, because there was nothing that I could do for him. This was not a credit problem. Other than from Maguire's standpoint, there was merchandise in the store that they knew nothing about and, of course, their procedure, if they took a floor check, was to mark those pieces as sold.

"Q. Of course, they would tell the floor checker, Mr. Petrick, where the merchandise was?

In fact he did floor check Sacramento? You knew that, [1018] didn't you?

"A. I understand later he did floor check Sacramento."

Now, it is a fact, sir, is it not, as you said in your deposition under oath, that Mr. Hines' problem in Sacramento was not a credit problem? A. Yes, that's what I said.

Q. All right. And that was a true statement? A. As far as I know it to be it was true, yes, as I can remember.

* * *

[1021] * * * Q. All right. At any rate, you got this call from Mr. Hines. You had a discussion and, as a matter of fact, sir, on the same day, September 7th, you called Mr. Rivers, your boss in Batavia, and relayed the information which you had received from Mr. Hines, didn't you? A. Yes, I did.

Q. And you told him just about in substance what Mr. Hines told you? A. I think I did. That's what I would relate to him. I wouldn't withhold any information from him that I had. And I don't think that I would add to that.

[1022] Q. All right. What did Mr. Rivers tell you in response? A. There is a memo, I believe, Mr. Miller, that I have seen not too long ago, and it's just that he would take care of it, I believe was his response.

Q. Didn't he, in substance, say to you, Mr. Lopolito, that thank you for passing the information on, and said that he would take it to whomever should

have it in the corporation, he would pass it on, in substance, isn't that what he told you? A. Perhaps he did. I don't exactly recall.

Q. And he also told you on the phone that day that he would find out what was going on, in substance? A. Again I am sorry I do not recall what he said.

Q. All right. Now, Mr. Rivers asked you to shoot a memo to him to advise him as to the status of Continental T.V., correct? A. Yes, I believe I sent him a wire.

Q. That's right. And he asked that in this conversation on the 7th, didn't he? A. I think the wire was the next day or so, so he must have asked me in the conversation on the 7th.

Q. Let me show you Exhibit BU, which is apparently the private wire system from yourself to Mr. Rivers. [1023] What is the date, please? A. It's 9/7 of '65.

Q. September 7th, the same day you talked to Mr. Hines? A. Yes.

Q. And the same day you talked to Mr. Rivers? A. Yes.

Q. You sent the wire to Mr. Rivers? A. Yes.

Q. The wire says "Continental T.V. Payments August 5, 1965, $4,499.58; August 11, $8,187.40; August 17, $5,542.14; August 25, $10,080.49. Orders released September 2, $110,000 J. P. M. balance as of September 2, $202,716. Signed Ken Lopolito, Los Angeles."

Why did Mr. Rivers want to know the last order which you had released to Continental? A. I do

not know. He had the same information at Batavia, but somehow or another—obviously he asked me for this information.

Q. All right, Mr. Lopolito. That was the August 27th order that you referred to in that wire, isn't that right? A. If that was $110,000, and it had to be considering the date.

Mr. Miller: All right, sir. [1024] We would offer BU as our next exhibit.

* * *

The Clerk: Exhibit BU introduced and admitted in evidence.

(Claimant's Exhibit BU marked and received in evidence.)

* * * Q. All right. Mr. Rivers told you something else on the 7th of September, did he not, in substance he told you to hold Continental's last order until the situation was worked out in Sacramento, did he not, Mr. Lopolito? A. Mr. Miller, I do not exactly remember him saying that, but I know there is a wire that went out, and that could have been the basis of that wire. My memory is not that good.

Q. All right, sir. How many telephone conversations do you recall having with Mr. Rivers on the 7th, the same day you heard from Mr. Hines? A. I can think of only the one, but that does not say that I didn't have more than one.

Q. Let me show you Exhibit BV, which again is a private wire, and its date, sir, is what? [1025] A. September 8th, 1965.

Q. One day after you talked to Mr. Hines and Mr. Rivers? A. Yes.

Q. And it's a wire to Mr. Rivers? A. Yes.

Q. From yourself? A. Yes, it is.

Q. It says:

"Please advise current situation regarding Continental T.V. and request for franchise Sacramento. I have held last order pending hearing from you. Signed Ken Lopolito in Los Angeles."

Is that right, Mr. Lopolito? A. Yes.

(Continued on next page.)

[1026] Q. You sent Mr. Rivers that wire, sir, the day after you talked to Mr. Hines, the day after you talked to Mr. Rivers by phone? A. Yes.

Q. The order which you were holding and which you referred to in this telegram was the August order, was it not? A. If that was the order that was indicated at the time, it was the August order.

Q. In other words, whatever orders had been accepted, approved and not shipped by that time were caught in this hold, were they not? A. By the wording of the telegram, yes.

Mr. Miller: I would offer Exhibit B-V as Plaintiff's Exhibit in order as marked, Your Honor.

* * *

The Clerk: Exhibit B-V introduced and admitted in evidence.

[Telegram marked Claimant's Exhibit B-V for identification was received in evidence.]

* * * Q. Now, at the time that you sent this wire, Exhibit B-V to Mr. Rivers and told him that you were

still holding the orders pending hearing from him on the franchise in Sacramento, you had not at that time been told [1027] of any credit review, had you, respecting Continental T.V.? A. I do not recall being told that at that time.

Q. As a matter of fact, Mr. Lopolito, it was sometime after the date of this wire, the 8th of September, that Mr. Rivers first told you that there was a credit review under way of Continental T.V.'s account; isn't that a fact? A. I don't recall the specific date.

Q. Do you remember whether it was after talking to Mr. Rivers on the phone? A. I am somewhat confused on those dates. There were several things that happened within a two-week period, and the sequence of those events I am not clear.

Q. Let me refresh you, on Page 183, Line 5:

"Q. After you approved the order and sent it to Mr. Stein, did you ever have occasion to contact Batavia and tell them to hold that order?

"A. I did not.

"Q. In fact that order was held, though, wasn't it?

"A. I understand it was.

"Q. How did you find out about that?

"A. I was informed by Batavia.

"Q. Who in Batavia?

"A. Tom Rivers, I believe.

"Q. At or about what time did Mr. Rivers advise [1028] you of this credit hold?

"A I would say perhaps fifteen days after I turned in the order.

"Q. Would this credit hold with Mr. Rivers be before or after you talked to Mr. Hines and Mr. Rivers?

"A. As I remember, it was after."

Now, does that refresh your recollection, sir, to this particular incident in that you in fact talked to Mr. Hines—— Mr. Rivers on the 7th of September, pursuant to instructions from Mr. Rivers on the 8th you sent this wire concerning Sacramento, and thereafter for the first time you were advised that there was a credit review of the Continental T.V. account? In that did you say that he mentioned that there was a credit review after such time? A. Yes, sir, if that's what I said at that time.

Q. Your recollection would be better then, wouldn't it? A. It should have been, [illegible], sir.

Q. All right. Now, did not Mr. Rivers also tell you sometime after you sent this exhibit B-V telegram that you were not to have any further contact with Continental T.V.? A. No, sir, I don't believe Mr. Rivers told me.

Q. Who told you that? [1029] A. Mr. Lockard.

Q. Mr. Lockard, controller of the company? A. Yes.

Q. All right. And he told you not to have any further contact with Continental T.V. and specifically not with Mr. Shahood, didn't he? A. Yes.

Q. And in fact, did he not suggest that you should have your phone calls screened so that you would not by inadvertence talk to somebody from Continental? A. Yes, he did.

Q. Now, at the time that Mr. Lockard told you that, did you know of any reason, Mr. Lopolito, why you should not be talking to Continental T.V.? A. You're asking me for my opinion, Mr. Miller?

Q. As of the date of that instruction from Mr. Lackard, did you know of any reason personally, as the credit man in Los Angeles, why you should not be talking to Continental T.V. or its representatives? A. I did not know specific reasons as to why I should not be talking to them.

* * *

Testimony of James W. Hines

[1110] * * * Q. Now, what was the situation by 1965, Mr. Hines, regarding the product line in color television? A. We were producing more color and more models in 1965 than we were in '64.

Q. What would you say Sylvania's share of the market in your territory was in 1965? A. Exact percentage I don't recall. It was considerable though.

(Continued on next page.)

[1111] Q. All right. Can you give me an estimate? A. I would say between 10 and 14 percent.

Q. And most of that volume, most of that market share was attributable to the purchases made by your large volume dealer in the County of Sacramento, isn't that a fact? A. Yes.

Q. The name of that dealer was what, sir? A. Handy Andy.

Q. And who owned and still owns Handy Andy? A. Mr. Keith Anderson. He is the president of the organization.

Q. By the way, does Sylvania make any independent survey of their own as to market penetration? A. To my knowledge, no.

Q. And the information that you get, and you do get some market share information from time to time, do you? A. Yes.

Q. Is based upon the EIA, so-called County penetration report? A. Yes.

Q. Do you know of your own personal knowledge, sir, that those reports utilizing EIA data are not accurate? [1112] A. Not entirely accurate, no.

Q. And that's your personal opinion, is it not? A. That's my personal opinion.

Q. All right. Now, we talked something about the territory, your market share. Let me ask you some questions about the nature and extent of your dealers in your territory, Mr. Hines. Now, in answer to interrogatories questions under oath your company has stated that in 1961 approximately 19 dealers in Sacramento carried the Sylvania product. Of course, that was before your time; correct? A. I started in December of '61, yes.

Q. All right. In 1962 the number remained about 19 dealers. Do you recall that, sir? A. Not exactly, I don't recall it. That seems correct what you have there.

Q. All right, sir. In 1963 the SLD program was installed for all approved and franchised dealers in Sacramento; correct? A. Yes.

Q. That's the only way the factory dealt with dealers, correct? A. Yes.

Q. Factory direct? **[1113]** A. Yes.

Q. And if the dealer wanted to handle the Sylvania products in Sacramento that dealer had to conform to the SLD policies, correct? A. Yes.

Q. 1963, according to the interrogatory answers, Mr. Hines, the number of dealers dropped from 19 to 7. Do you recall that? I know this chart is a little small. A. It is.

Q. Let me read these to you: Handy Andy, J. W. Brewer, North American Appliance, North Sacramento T.V., Allied Builders Credit, Bank Furniture, Sacramento Employment Enterprise. Is that correct? A. I believe it is.

Q. All right, sir. The total purchases in 1963 for the year, $169,168 compared to the previous year total of $43,817. So, there was a substantial increase in purchases of Sylvania products in Sacramento in 1963. Do you recall that? A. Yes.

Q. Of that substantial increase, Mr. Anderson, Handy Andy purchased almost $97,000 worth. Do you recall that, sir? A. Vaguely, yes.

[1114] Q. All right. He was franchised in March, according to the interrogatory answers, of 1963. So, for nine months he produced purchases of almost $97,000, correct? A. Yes.

Q. Okay. Now, in 1964 the number of dealers went from 7 to 4. The fourth dealer, North American Appliance terminated early in 1964. So, by the middle of 1964 there were three dealers, Handy Andy, J. W. Brewer and Tri-State Sales in Sacramento handling Sylvania products, correct? A. Yes.

Q. Now, in that year Handy Andy purchased $245,619 worth of Sylvania products, quite a large volume, do you recall? A. Yes.

Q. The second dealer, J. W. Brewer purchased $34,000 for the year, and purchased only one color set. Mr. Hines, do you recall that? A. Yes.

Q. And, as a matter of fact, in addition to the fact that Brewer only purchased one color set, the Brewer Company sold retail all of their purchases outside the County of Sacramento. Do you recall that their shipments went to Bijou, California, and to Reno? **[1115]** A. Mostly at Lake Tahoe.

Q. Yes. A. Yes.

Q. And the third dealer, in 1964, purchased $535 worth of products for the year, one color set. You recall the extent of that dealer's purchases? A. Yes.

Q. All right. Now, 1965 we presumably still have those three dealers, Mr. Hines, Handy Andy, Brewer and Tri-State, and the interrogatory answers indicate that Handy Andy during that year purchased almost a million dollars in Sylvania products, $838,505. Very large volume, would you say? A. Yes.

Q. The second dealer in Sacramento purchased $11,290 for the year, the Brewer Company. Again, Mr. Hines, during 1965 the Brewer Company only purchased one color set. Handy Andy purchased hundreds and hundreds of color sets, correct? A. Yes.

Q. Tri-State in 1965 spent $327 with your company and didn't purchase one color set. Do you recall that? A. Yes.

Q. As a matter of fact, into 1966 both Brewer and Tri-State terminated their relationship with Sylvania; [1116] correct? A. Yes.

Q. So that by the middle of 1966, in fact, Handy Andy was the only T.V. and Appliance store in Sacramento handling Sylvania merchandise, correct? A. No. I believe Sherman and Clay had a branch. I am not sure of the year, but I believe that they did.

Q. Mr. Hines, let me show you the original answers to the interrogatories that are entitled "Continental T.V., Inc., First Interrogatories, Schedule 6, Interrogatory 6." And in answer to an interrogatory requesting the names, addresses and nature and extent of purchases of all dealers in Sacramento County our clients received those answers. Would you look through those pages and tell me if you can find any other dealers beside Handy Andy, Brewer and Tri-State in 1965?

Mr. Popofsky: Your Honor, we will stipulate that the answer does not contain a reference to Sherman and Clay. We prepared those in connection with the client's office in Batavia. The answer was not interpreted as covering branches. And for that reason branch operation such as Sherman and Clay do not appear in those answers. If those answers are in error they are in error to that extent. That was the interpretation given to the interrogatories. This witness did not participate in the preparation of the [1117] answer.

Mr. Miller: We accept the stipulation, Your Honor.

The Court: Very well.

* * *

Q. All right. So it appears, Mr. Hines, that from a high of 19 or so dealers in 1962 at the time that the SLD program was installed nationally until 1966, the number of dealers consistently decreased in Sacramento, correct? A. Yes.

Q. And it also appears that as the number of dealers decreased your total yearly sales actually increased, correct? A. Yes.

Q. And it appears that the factor which caused that to happen was Handy Andy, Mr. Keith Anderson's firm, correct? A. Yes.

Q. All right. Now, in 1964 we can see from the chart that Mr. Anderson purchased about a quarter of a million dollars for [1118] the year from Sylvania. In 1965 we can see from the chart that he purchased also a million dollars, four times what he had purchased the year before. Can you estimate for us, sir, the portion of your total territorial sales which Mr. Anderson accounted for in 1964? A. I would say it was in excess of 40 percent.

Q. So Mr. Anderson in 1964 purchased more than 40 percent of all sales made by your company in this geographic territory which you described originally? A. Which is my territory.

Q. Yes, sir. A. Yes; yes.

Q. Who was your next largest dealer in your territory, not in Sacramento but in your territory, in 1964? A. Statewide Appliance, Reno, Nevada.

Q. Statewide Appliance located in Reno, Nevada? A. Yes.

Q. All right. About how much territorial purchases were accounted for by that dealer? A. 10 percent or less.

Q. All right, sir. Did you have any other dealers that accounted for [1119] 10 percent or so of your territorial purchases beside this Reno dealer? A. I don't recall, Mr. Miller. I don't think so.

Q. Now, prior to 1962 and at a time when you had these 19 dealers in Sacramento, I think you have alluded to the fact that you did not use written franchise agreements? A. That's correct.

Q. So that about the time that you started with the company, I assume you went through some training program? A. Yes.

Q. And did Mr. Steiner become personally involved in your training? Did you spend time with him? A. I don't think so.

Q. Were you trained in Batavia? A. Yes.

Q. Did you talk to Mr. Theis, the president of the corporation? A. Yes.

Q. Did you talk to Mr. John Morgan, the vice president? A. Yes.

Q. And did you talk about the sales policies with those two gentlemen? A. Yes.

[1120] Q. This would have been back in 1962? A. Yes, or——

Q. Or early '63, correct? A. Yes.

Q. Now, as I understand the situation, Mr. Hines, prior to the SLD installation, prior to the use of these written franchise agreements, and prior to the SLD policy, Sylvania pretty much sold to any dealer who wished to purchase? A. Yes.

Q. Go down the street and if 10 wanted to purchase on the street, 10 purchased, right, sir? A. Yes.

Q. And prior to 1962, to your knowledge, sir, Sylvania did not tell any dealer that they had to seek any kind of approval before that dealer could open other locations, did the company? A. No.

Q. So when the Sylvania company went from the distributors as a distribution policy for products to the SLD, the factory direct method, that was the time that this written franchise was installed? A. Yes.

* * *

[1122] * * * Now, Mr. Hines, in franchising new dealers in 1962 you explained the elbow room policy to them, did you? A. In 1962?

Q. Yes, sir. A. Yes.

Q. All right, sir. And let me show you Exhibit C, which is another page [1123] or two from the sales manual, and refer you to page 2 of that set. The last paragraph is entitled "How Much Elbow Room Is There Really In Our Program. You use the following industry statistics as evidence of our limited number of dealer approach. Note: We give super elbow room, while elbow room is adequate to make the program a success."

Now, basically, you told and represented to dealers in 1963 this information contained on this page, did you not? A. Yes.

Q. All right, sir. Let me show you two more pages from your sales manual, sir, Exhibit F.

Mr. Hines, would you please try to keep your voice a little higher. I think we are having difficulty hearing you in the back.

Now, you will note, Mr. Hines, that first—the second paragraph—well, first paragraph says, "Sylvania

home entertainment products are only sold through franchised dealers."

The second paragraph says, "The franchise is not a meaningless paper that puts the dealer in a profit squeeze with weak competitors. The franchise is based on stability of direct factory relationship with a strong, straight-forward program of policy and understanding. The franchise contains **[1124]** a good profitable selling climate by creating elbow room in a sensible territory based on market and dealer potential 'same brands' competition is eliminated."

In substance, you told the dealers in 1963 that you franchised the information contained on this page; correct? A. Yes.

(Continued on next page.)

[1125] Q. All right. Going down the page, paragraph next, the last sentence in 2-A—strike that. 3-A:

"Financing: Sylvania offers the dealer the finest method of financing in this industry, the J. P. Maguire plan. This plan"—and then it says, "See Management Section Check List No. 19—" "This plan offers the easiest financial method of maintaining a representative display of the Sylvania product, a tremendous plus factor in our program."

You also represented to dealers, sir, when you solicited them for franchise, you represented the information in substance shown on that page that I have just read, correct? A. Yes.

Q. All right, sir, turning to the second page, first paragraph, first sentence, "Straight line distribution," are you with me, sir? A. Yes.

Q. "Straight line distribution is Sylvania's concept of the proper way to distribute and market products in the metropolitan markets." Skipping down to the first and second sentence of the next paragraph:

"SLD is designed for the present and for the future. It gives Sylvania better control of its distribution," et cetera.

[1126] Going down to the fourth paragraph:

"SLD also eliminates same brand competition," in quotes. "Sylvania wants fewer dealers and quality rather than quantity. By not overfranchising, straight line distribution eliminates vicious price cutting and establishes suggested go prices. That enables each dealer to make a fair profit and each consumer to receive an outstanding value."

Goes on to say, Mr. Hines:

"Elbow room gives every Sylvania dealer a geographic area in which to sell our Sylvania products. SLD does not promiscuously franchise dealers without first studying their size, location and effect on the market, as well as on other Sylvania dealers in the area. By franchising dealers by territory Sylvania becomes an important profit factor to its dealers."

Mr. Hines, in 1963, and indeed through 1965, is it not a fact that you represented in substance the information contained on this page of your sales manual to prospective dealers, sir? A. Yes.

Q. All right. And to your personal knowledge, the information which I have read to you from your sales manual [1127] is your understanding of your company's sales policies during the years 1963 through 1965? A. Yes.

Q. So it is a fact, is it not, that under this SLD program dealers are expected by Sylvania to adhere to certain suggested retail pricing? A. Yes.

Q. And is a fact, is it not, that a portion of the SLD policy is directed to encourage dealers to do so? A. Yes.

Q. Now, Mr. Hines, when is the first time that you were aware or heard that Continental T.V. ont of the Bay area was thinking about a proposed Sacramento location? A. I'm not sure, Mr. Miller. I believe it was in, let's see, spring of—spring or summer of 1965.

Q. All right, sir, in the spring of 1965. And from whom did you hear this information? A. I'm not certain, sir.

Q. All right. Let me see if I can refresh your recollection, sir. Page 66, Line 4:

"Q. When did you first become aware of the fact that Continental T.V. intended to open a store in Sacramento?

"A. Actually after they got here.

"Q. Well, isn't it true, Mr. Hines, that you [1128] had a conversation or heard a conversation in Chicago about this during the——

"A. Heard one prior to that, that they also were going to open up in Stockton. Stockton was

the primary target for the spring of 1965. That's what they were talking about opening up first.

"Q. Let's go back, then, a few years. I assume you know George Shahood.

"A. I know George Shahood.

"Q. When did you meet Mr. Shahood for the first time?

"A. In Chicago I believe I met him.

"Q. Approximately a year ago June of 1965?

"A. Yes.

"Q. Now prior to that time when did you first become aware of Continental T.V. as a Sylvania dealer, if in fact you did?

"A. I was aware of them about six months before, or nine months prior to that. I heard about them and volume of business they were doing, and so on.

"Q. And who advised you of this, do you recall? Page 67:

"A. Nobody advised me of it. I heard it in general conversation.

"Q. Do you recall who was generally conversing [1129] at that time?

"A. No.

"Q. But you say initially it was your understanding that their intent was to move into Stockton?

"A. That's correct.

"Q. From whom did you obtain this impression?

"A. Lee French and Don Carroll, if my memory serves me right.

"Q. When and where was this discussion?

"A. In general conversation, nothing specific—no specific meetings or anything like that.

"Q. Was it personally, not over the phone? It was with French and Carrol someplace?

"A. Could have been on the plane in our numerous trips back to the factory, or could have been down to a sales meeting that we had, regional sales meeting. I don't recall exactly where it was. I do recall however, that I did know of it.

"Q. Do you recall when this was, approximately?

"A. Oh, I would say the closest I could come to that would be the spring of 1965.

"Q. Was there any mention that—I may have missed this. Was there any mention at that time of Sacramento and Stockton, or just Stockton?"

[1130] Page 68:

"A. There was a mention of Sacramento at that time, but it was awfully hazy. There was nothing specific or concrete, no specific mention that they were definitely coming in, no target date set, anything like that."

Now, Mr. Hines, does that refresh your memory as to the fact that you talked to Mr. French and Mr. Carroll in the spring of 1965 concerning the possibility, the mere possibility at that time? A. Yes.

Q. Okay. Of course, when you had that discussion, as you pointed out in your deposition, you had heard of Continental T.V., correct? A. Yes.

Q. And you knew that they were an extremely large volume dealer for your company and the Bay Area? A. Yes.

Q. You knew they had a chain of stores at that time. A. Yes.

Q. Of course, in that discussion no mention was even made as to what side of town Continental may be proposing, nothing even that specific; is that right? A. No.

Q. So it is a fact, it was just a vague idea, **[1131]** impression you had that Continental may come to Sacramento? A. Yes.

Q. You didn't know what part of town, you didn't know what street they were thinking about, if any? A. No.

Q. You didn't know what their proximity might be in relation to Handy-Andy? A. No.

Q. Mr. Hines, in the spring of 1965, did you need more dealers in Sacramento, California. A. No.

Q. You did not, did you? A. No.

Q. As a matter of fact, sir, prior to the spring of 1965, Mr. Carroll, your immediate superior and regional sales manager, had informed you, had instructed you not to spend time to look for franchise dealers in the city and County of Sacramento, isn't that a correct statement? A. I don't recall, sir. It's possible.

Q. I'm sorry? A. It's possible. I have no knowledge of this.

Q. Is it not a fact, Mr. Hines, that you were not, in the spring of 1965, actively soliciting dealers in the

city and County of Sacramento to become franchise Sylvania dealers? **[1132]** A. That is the fact.

Q. And is it not a fact that that was the situation that existed in Sacramento from about the middle of 1963? A. Yes.

Q. And is it not a fact that that's the situation that existed throughout 1965 and through 1967? A. Yes.

Q. And is it not a fact that that's the situation that exists in Sacramento at the present time? A. Yes.

* * *

[1150] * * * Q. Let me see if I understand that, Mr. Hines. Are you telling me that because one or more of Continental stores were approved and franchised in the bay area that Continental T.V. could automatically go to Sacramento, for instance, without any pre-approval from yourself? A. I am not suggesting that Mr. Miller. I am stating that where there is a branch operation and there is a central buying office, normally, the franchise is handled out of the central buying office of whichever town that may be located in.

Q. Are you telling me that Mr. French himself would have authority and did in fact have authority to grant a franchise to Continental T.V. for the Sacramento location? A. He would have to take the franchise application, but he didn't have the authority, I don't believe, to grant it.

Q. You had the authority to grant it, did you not, Mr. Hines? A. Not entirely. To a certain respect

that is true. **[1151]** My views would have been considered in that.

Q. In conjunction with Mr. Carroll's views, correct? A. Yes.

Q. In other words, you and Mr. Carroll would jointly make that decision, correct? A. Yes.

Q. And—— A. With Mr. French calling on the main office.

Q. That is because of the inter territorial aspect? A. Yes.

Q. And that is in fact the way it worked at the time the Sacramento store was opened, correct? A. Correct.

* * *

[1167] * * * Q. All right. Now, what happened to the demand for color merchandise **[1168]** commencing in August, approximately, of 1965? A. It had increased at a great rate.

Q. And had there been a rather steady increase through 1965? A. I would say from August of '65 on it was a tremendous increase over any months prior to that in '65.

Q. Now, you have been in this business, in this industry several years. Was it not an unprecedented demand? A. It was.

Q. Industry had not seen anything like it previously? A. Never.

Q. And you haven't experienced anything like it since, have you? A. Never.

Q. Probably never will. Now, again, as a person that's worked for years in this business, to what did

you attribute this unprecedented demand for color sets commencing about August of 1965, September of 1965? A. The demand was because all networks suddenly announced they were going to have almost complete color for the fall. And in their announcement of it, everybody, every consumer who didn't have color seemed to want color.

[1169] Q. Was it your understanding that this condition prevailed in your territory, commencing about that time? A. Yes, it definitely did, yes.

Q. Was it your understanding that that condition prevailed in the other markets in Northern California? A. Yes.

Q. And indeed in the industry in general? A. Yes.

Q. Now, as I understand it, all the dealers in your territory were put on factory allocation at some point in time? A. Yes.

Q. Sorry, Mr. Hines? A. Yes.

Q. And I assume that Handy Andy was put on allocation also, is that correct? A. Yes.

Q. Now, do you recall the first allocation period, Mr. Hines? A. I believe it was September of 1965.

Q. All right. A. It could have been earlier. I am not sure.

Q. So, for a period commencing about September, 1965 through the end of 1965, color merchandise was so much in demand that Sylvania allocated a number of color sets **[1170]** dealers could purchase, correct? A. This is correct.

Q. All right. And, as I understand it, this allocation procedure by Sylvania continued through 1966, is that so? A. Yes.

Q. And the information we have received from your company in interrogatory form indicates that at least through November of 1966 the factory continued to allocate color sets. Is that your recollection? A. Yes.

Q. I note here that Handy Andy was estimated by the factory at the end of 1965 to be a potential one point five million dollar purchaser the next year. How close did Mr. Anderson come to purchasing that estimate of one point five million dollars in Sylvania products during 1966, sir? A. I believe that Mr. Anderson exceeded a million dollars. I am not quite certain, though, Mr. Miller.

* * *

[1174] * * * Q. You know of your own knowledge that Mr. Anderson does not attempt to reach a volume market outside of the City and County of Sacramento, don't you? A. Yes.

Q. Have you heard of a dealer in San Francisco who sold in volume any brand of television set in your Sacramento territory? A. No.

Q. And the reason for this, Mr. Hines, is it not, that in the television—retail television business, as you well know, it is simply economically practical for a dealer to try to attract a volume consumer clientele over those distances. A. This is correct.

* * *

[1180] * * * Q. During the course of your conversation with Mr. Shahood, did he say anything about Sylvania or his plans concerning Sylvania? A. Yes.

Q. What did he say, sir? A. I believe Mr. Shahood said that he was cutting down on Sylvania merchandise at that particular time.

Q. Did he say anything else about his attitude towards Sylvania? A. He was also irritated at Sylvania.

Q. Did he express to you any reason why he was irritated with Sylvania? This is August, 1965. A. I believe it stems from the June Chicago meeting.

Q. All right, sir. With respect to Handy-Andy, did you at any time make any commitment to Handy-Andy with [1181] respect to the subject of franchising in the Sacramento area? A. No.

Q. Did you make any promise to Handy-Andy concerning his opportunity, if any, to review your franchising plans? A. No.

Q. Did you ever talk to Mr. Anderson or anybody—Mr. Anderson about Continental T.V.? A. Other than in August of 1965, when Mr. Shahood and Mr. Anderson and myself and one of the Philco representatives were together, that's it.

Q. What was said by Mr. Anderson in that regard, as best you can recall? A. I don't recall what it was.

Q. Did Mr. Anderson at any time complain to you personally about the presence of Continental T.V. in Sacramento? A. No.

Q. What percentage, if you know, in or about 1965, of Mr. Anderson's sales at Handy-Andy, were

represented by Sylvania? A. You're speaking of in relation to the other lines that——

Q. That Handy-Andy carried. A. I would say that 1965 his Sylvania percentage [1182] was in excess of 40 to 50 percent of all merchandise he handled.

Q. What other lines did he handle, if you know? A. RCA, General Electric.

Q. In operating the elbow room policy, did you object at any time to Mr. Anderson or anyone else about handling other lines. A. No.

Q. In operating the elbow room policy, sir, in your area, did you give any instructions or make any representations to your dealers concerning the territories into which they might sell? A. No.

Q. How far incidentally is Roseville away from Sacramento? A. Approximately fifteen miles.

Q. Fifteen miles? A. Hm-hum.

Q. How far is Woodland from Sacramento? A. About twenty miles.

Q. About twenty miles. Did you have dealers in Roseville and Woodland in the year 1965? A. I think I did, yes.

Q. Approximately how many dealers were there, that is to say, retail establishments that sold television sets [1183] to general consumers in the Greater Sacramento area in the year 1965? A. That sold retail, approximately three.

Q. That's Sylvania. How many were there of all brands? A. Approximately one hundred.

Q. From your observation, sir, were most of the major brands represented in Sacramento in 1965? A. Yes.

Q. In one dealer or more—one of the retail outlets, that is to say. A. Yes.

Q. Did you at any time ever promise any of your dealers that you would not franchise a competing dealer in their general trade area? A. No.

* * *

[1185] * * * Q. How far would you say, Mr. Hines, the Continental Sacramento store was located from the Handy-Andy store? A. Less than ten blocks.

Q. Were these stores on the same street? A. Yes.

Q. On the same side of the street? A. Yes.

Q. You estimate that there are 100—or there were 100 TV retail stores in Sacramento handling all brands in 1965. A. Yes.

Q. How many of those stores handled RCA, would you estimate, in 1965? A. I would say at least forty to fifty percent of them, if not more.

Q. So out of a hundred, forty or fifty of those dealers would carry RCA? A. Yes.

Q. And if I were a customer in Sacramento in 1965, and I desired to buy an RCA brand, I could go to either forty **[1186]** or fifty locations in Sacramento and look at the display, talk to the dealer about prices and selection, right? A. Yes, if not that, even more dealers than that.

Q. Right. But if I, as a customer in 1965, desired to buy a Sylvania brand, I had to go talk to Mr. Keith Anderson at Handy-Andy, did I not? A. Or

Sherman and Clay, which was a branch outlet store. Yes, this is so.

Q. And I had to accept, if I wanted that Sylvania brand product, I had to accept Mr. Anderson's displays, his merchandising line and his prices, or drive out of the Sacramento area and look elsewhere, correct? A. With the exception of the branches that were there of Sherman and Clay, this is correct.

* * *

Testimony of Thomas J. Lea

[1317] * * * "Q. What is the primary business of John P. Maguire Company?

"A. We are in the general finance business. Our most important and largest operation is factoring.

"Q. It would be factoring accounts receivable for organizations?

"A. Factor purchases, accounts receivable outright without recourse, among other things, make loans against inventory and other collateral."

* * *

"Q. Going back to 1962, when you negotiated the relationship with Sylvania, what, basically, were the terms of your agreement with Sylvania, as far as flooring?

"A. Well, it's a contractual agreement whereby we undertake to service their floor plan operation to their dealers. It is a final recourse arrangement to **[1318]** Sylvania. Our functions are primarily to handle the refiling and recording, to do the field auditing, to do the collection.

* * *

"Q. Has there been any other contract or contracts since 1962?

"A. That contract was revised in the spring of 1965"

* * *

"Q. You mentioned the agreement with Sylvania. I take it it's still the same, a full recourse?

"A. That is correct.

"Q. In other words, if a dealer did not pay, or otherwise did not fulfil its obligations, Sylvania would in effect indemnify you against any loss?

"A. That is correct.

"Q. Do you have any obligation under this agreement to repossess merchandise?

"A. Yes, we do."

* * *

"Q. Mr. Lee, what obligation does Maguire have under this contractual arrangement relationship prior to Sylvania's making full payment or indemnification to Maguire, in the event of default by a dealer?

"A. In the case of default by the dealer, Sylvania **[1319]** is put on notice of the complete status of the transaction, and if repossession is desired, by them, we perform it at their request."

* * *

"Q. Mr. Lee, since 1962, have you had regular contact with any Sylvania personnel regarding the floor plan accounts?

"A. Yes, I have.

"Q. With whom do you deal at Sylvania?

"A. Principally with Mr. Lockard. We have also had rather close association with Mr. Callahan and Mr. Rivers."

* * *

[1341] * * * "Q. Mr. Lea, Mr. Allen had advised you in his prior letter as to the method of computation of maturities by Continental. And your reply was that his understanding was incorrect. You say: 'the plan provides that you shall have a free four month period from invoice date.'

"What part of the plan provides that, Mr. Lea?

"A. Well, the plan itself provides that, that computations are from the date of the invoice. I have explained to you several times, it's a trade practice——

"Q. In fact, Mr. Lea, right here today you can't tell me anywhere in writing that it tells the dealer how to compute maturities?

"A. No, I cannot.

"Q. It is a trade practice, that's your answer?

"A. That's my answer."

* * *

"Q. Who told you to file suit on behalf of Maguire?

[1342] "A. Well, nobody told us. We took a joint action which, at the request of Sylvania—I mean after discussion with them.

"Q. Mr. Lockhart again discussed it with you?

"A. Mr. Lockhart discussed it with me."

* * *

[1345] * * * Mr. Miller: Next we would offer Exhibit C-F which is a telegram. I would like to read that into the record. It is dated September 22—same date as Mr. Lea's letter—1965. It purports to be a wire from Continental TV to Maguire Company.

"Attention Don Pedlow, 1290 Avenue of the Americas, New York.

"A variance in status of our account with Sylvania maturity dates do not check with our records and merchandise we have returned as far back as 6 months ago **[1346]** are still being carried on trust receipts. Have made repeated attempts to discuss this with Sylvania's credit department in Los Angeles but without result. Are withholding all future payments until these points are cleared up.

"George M. Shahood, Continental TV, Inc."

[Continued next page. Nothing omitted.]

[1347] We would offer CF, Your Honor, as the Claimant's next as marked.

* * *

The Clerk: CF introduced and admitted in evidence.

Mr. Miller: Next, Your Honor, in connection with Mr. Lea's deposition, I would like to read Exhibit EM into the record.

This exhibit is a letter dated September 24, 1965 to Mr. Lea from Mr. Webster F. Allen, vice president of Continental T.V., Incorporated.

"Dear Mr. Lea:

"We have for the past two weeks made continual attempts to contact Mr. Ken Lopolito of

Sylvania's credit department in Los Angeles. Mr. Lopolito has refused to talk to us, return our calls, or engage in any communication with us.

"There is a discrepancy on our account regarding dates of maturity. Your records reflect the dates merchandise was invoiced to us. Our records reflect the dates merchandise was received by us. The dates vary from 10 days to two weeks later than the date of the IBM maturity. It is our understanding and has always been our understanding **[1348]** that under the flooring plan we have four months free flooring from time of delivery, and two months extension.

"Under the outline of Mr. Lea Lockard's letter of June 21, 1965, he granted us one week grace period in order to process the papers from our various stores. Mr. Lockard understood our position regarding payment for merchandise as soon as it left our floor.

"We are sure the interest charges on all items of maturity reflect from the date of your records and not from the date merchandise was received. Also the statement contains interest charges on damaged merchandise which was picked up by the various freight carriers months ago. We have made every attempt at getting this discrepancy reconciled to no avail.

"We have been told that the credit department in Los Angeles has been advised by Mr. Lockard not to talk to anyone from Continental T.V. Our account is still active under someone from Ma-

guire Company and Sylvania comes into our Santa Clara store and meets with our Internal Inventory Accountant and reconciles this matter.

"Concerning the matter of damaged merchandise **[1349]** being picked up, notification was given to your representative on the occasion of the monthly floor check and notations were made in his monthly report to your company. We have records in our files to substantiate this.

"Therefore, in reference to our previous telegram regarding our account and returned items, no further checks will be forthcoming until the representatives from Sylvania and Maguire Company give justification to the reduction of our credit line to $50,000 and reason for the reduction has been given to us.

"On our previous 12 or 13 floor checks there has never been any unpaid items out of trust, there has never been a time that we have failed to meet our obligations on maturities.

"We will await your reply regarding our differences and trust that an early resolution to our problems will be forthcoming.

"Very truly yours,

"Webster F. Allen."

Copies sent to Mr. Pedlow of the Maguire Company and Mr. Lockard controller of the Sylvania Company.

We would offer this EM, Your Honor, as Claimant's next as marked.

[1350] * * * The Clerk: Exhibit EM introduced and admitted into evidence.

(Claimant's Exhibit EM marked and received into evidence.)

* * *

Testimony of George N. Shahood

[1424] * * * Q. Now, how long did you work for Mr. Hackett's firms, sir? A. Until November of 1960.

Q. All right. What happened at that time? A. Mr. Hackett and myself opened a store in Santa Clara, a Muntz T.V. store.

Q. And what was the address of that store? A. 177 West Santa Clara Street.

Q. And was that store operated under Mr. Hackett's corporation? A. No, sir.

Q. Was there a new corporation? A. Yes. A new corporation was formed.

Q. What was the name of that corporation. A. Continental T.V., Incorporated.

Q. Do you remember when that corporation was organized, sir? A. Yes, sir.

Q. When was it? A. November, 1960.

Q. And who were the shareholders in that corporation **[1425]** originally? A. Mr. and Mrs. Leroy Hackett, and my wife, Margarita.

Q. All right. And it was a Muntz dealer? A. Yes, sir.

Q. Did you handle any other brands, initially? A. No, sir.

Q. And you had one location, did you. A. Yes, sir.

Q. Now, did Mr. Hackett continue to be active in that corporation from that time on? A. Just to the point where he was supplying us merchandise from his operation in San Francisco.

Q. I see. Mr. Hackett dealt with the manufacture of Muntz? A. Yes, sir.

Q. And what were your primary duties originally in Continental T.V.? A. I was general manager.

Q. All right. Now, did Mr. Hackett stay with Continental T.V.? A. No, sir.

Q. When did he leave? A. In February, 1961.

[1426] Q. And why did he leave? A. He was having problems in his own corporation. He was contributing nothing to Continental T.V., Incorporated. It was a constant drain in our corporation, and we offered to buy him out.

Q. All right. And did you in fact purchase Mr. Hackett's shares? A. Yes, sir.

Q. And after, did you say February, 1961? A. Yes, sir, late February, I believe.

Q. After that date did you and your family substantially own all of the stock of Continental T.V., Incorporated? A. Yes, sir.

Q. All right. Now, by the way, in those days did you have a business lawyer? A. Yes, sir.

Q. And who was he? A. Mr. Sidney Rudy.

The Reporter: Rudy or Ruby?

The Witness: R-u-d-y.

Mr. Miller: Q. One of the attorneys associated in this action? A. Yes, sir.

[1427] Q. All right. Now, in 1960-61, Mr. Shahood, would you describe the premises that this corporation operated from 177 West Santa Clara Street in San Jose? A. It was a relatively small store.

Q. Excuse me. What would you say the frontage was? A. Approximately 20 feet.

Q. How deep would you say it was? A. Approximately 90 feet.

Q. Excuse me. Go ahead. A. It was 1800 square feet. It was a very small store.

Q. How many salesmen did the company employ at that time? A. Full-time two, and myself and Mr. Greco, and we had one or two men that came in on a part-time basis, I believe.

Q. You worked personally as a salesman? A. Yes, sir.

(Continued on next page.)

[1428] Q. What were the store hours? A. From nine in the morning 'til nine at night.

Q. How many days a week was the store open? A. Seven days.

Q. And during the period 1960 to 1963, how many hours a day would you say you personally gave to this business? A. Approximately 14 hours a day.

Q. How many days a week? A. Seven days a week.

Q. All right. Now, how many trucks did this company have in 1960 and '61? A. One.

Q. Delivery purpose? A. Yes sir.

Q. Did your company, your store in those days handle any color television products? A. No sir.

Q. Was there any color market in those days. A. No sir.

Q. All right. During the years 1961 until let's say the middle of 1964, Mr. Shahood, did your corporation, Continental TV, Inc. open any other stores, any other locations? A. Yes, we did.

[1429] Q. Would you tell us about that? A. Yes. Periodically we would rent small showroom type stores in the proximity of our central store. They were very small stores——

Q. What was the idea of that? A. Primarily the basis for our salesmen to operate from, where they could stay in that particular area, bring people in to show them the merchandise.

Q. Did you have personnel to run those locations? A. No sir.

Q. And did you add product lines, different brands? A. No sir.

Q. Still Muntz brand? A. Yes sir.

Q. Were those permanent locations? A. No sir.

Q. How long would you say on an average those locations remained open? A. Three to six months.

Q. And why were they closed? A. We didn't have financial resources to keep them open. We didn't have product or money to support them.

Q. Now, during those years, 1961 through 1964, did you personally have a desire to grow, to have a chain of stores? A. No sir.

[1430] Q. Why is that? A. We knew our limitations. We were a very small business. We had very limited capital, very limited personnel.

Q. Now, you have mentioned your basic product during those years was Muntz. A. Yes.

Q. Would you tell us the terms upon which you purchased Muntz from the factory at that time? A. Initially they were sent to us in what amounted to a COD basis.

Q. You had to pay for them when you received them? A. Yes sir.

Q. Did that arrangement change at any time while you were dealing with Muntz? A. Yes.

Q. What other arrangement was given? A. After we had been dealing with them a number of months, they changed that to a net 10 basis, and in some cases a net 30 basis.

Q. And what did those terms mean? A. Net 10 meant that you paid for the purchases of one month on the 10th of the following month. Net 30 meant you paid for them 30 days after you received the merchandise.

Q. Did the Muntz factory ever extend any lengthy credit terms to Continental? [1431] A. No sir.

Q. Now, during the years 1961 through 1964, Mr. Shahood, other than the relationship as it developed with Sylvania, did your company handle any other brands other than Muntz? A. Yes sir.

Q. What other brands did you have? A. We handled Dumont television and stereo, and Emerson television and stereo.

Q. All right. From whom did you purchase Dumont? A. From Kemper and Barrett.

Q. Where are located? A. In San Francisco.

Q. And what type of firm are they? A. They're a local distributor.

Q. And did this Kemper and Barrett company, did they extend your company credit? A. Yes sir.

Q. And what terms did you purchase. A. They extended us $10,000 worth of credit and the terms were 30, 60, 90.

Q. Now, did you have Dumont product on your floor prior to your introduction to the Sylvania line? A. Yes sir.

Q. And was your credit line at any time prior to [1432] meeting Mr. French higher than $10,000 with Kemper and Barrett? A. No sir.

Q. You mentioned I think Emerson products? A. Yes sir.

Q. From whom did you purchase that brand? A. Emerson West Coast Distributors.

Q. Where were they located? A. In San Francisco.

Q. And upon what terms did you purchase that product? A. Same terms as Kemper and Barrett, 30, 60, 90.

Q. All right. And do you know what your credit line, if any, was with that company? A. Yes sir.

Q. What was it? A. $10,000.

Q. And did it ever rise above that prior to your Sylvania relationship? A. No sir.

Q. All right. Did you mention Motorola products? I believe you did. Did you have Motorola brands sometime in 1974? A. Yes sir.

Q. Where did you purchase that product? A. From W. G. Lancaster Company.

[1433] Q. And what is that company? A. Distributors of Motorola and Norge products in San Francisco.

Q. Now, prior to July of 1964, Mr. Shahood, did your company lodge any wholesale floor financing for any product? A. No sir.

Q. Had you had any personal experience with any floor financing programs with anybody else's business? A. No sir.

Q. All right. Now, I'd like you to tell us briefly about the manner of retail sales, the manner in which you made retail sales during the years 1961 through 1963. A. We made them dually. We advertised in local newspapers and over the radio that we would make home demonstrations, and home demonstrations were available to customers who didn't want to come in the store. They would call up and then we would send out a sales representative to their home with merchandise and brochures. A small percentage——

Q. May I stop you there for a moment. If a customer phoned in and requested that service, as I understand it you would take a catalog and a salesman would go to the home of that customer? A. We would take a catalog and many times a television set.

[1434] Q. If a customer wanted to see the merchandise in their home, would your company—— A. Yes.

Q. ——take the merchandise—— A. We would take it out to them and demonstrate it in their home.

Q. I'm sorry I interrupted you. Go ahead. A. Some sales were made in the store also.

Q. Now, did you sell to the consumer on credit—— A. Yes.

Q. ——in those days? A. Yes sir.

Q. And did you start out initially doing credit consumer business? A. Yes sir. The majority of our business was credit business.

Q. Would you explain how that works in your business? A. We would offer terms to the customer in our advertising. We would make our demonstration, a salesman would—either in the store or in the home would offer them terms, if they so desired. We would take a credit application, write up conditional sales contract for the amount owed over a period of time, we would then submit the credit application to our financing institution. If they approved the credit, we would then **[1435]** deliver the television set and sell the contract to the financial institution and get the funds.

Q. Was the bulk of Continental's business during those three years done on credit—— A. Yes sir.

Q. With the consumer? A. Yes sir.

Q. All right. Now, what financial institutions had you used from 1960 to 1963 when you dealt in selling consumer contracts? A. Crocker Citizens Bank, Century Acceptance and Pacific Finance.

Q. All right. Now, why was it that you dealt with finance companies and also with banks for that purpose? A. Well, banks were always preferable because they offered better terms both for Continental and—Continental TV and the customer. The finance company offered less desirable terms, but they were much more lenient in their credit demands.

Q. O.K. Let's see, you said the customer preferred the bank over the finance company also? A. Yes sir.

Q. Do you know why that was? A. Well, they just had a preference to deal with banks, **[1436]** the connotation of a bank was superior to a finance company.

Q. And you mentioned that the terms were better for Continental TV from the bank than from the typical finance company. A. Yes sir.

Q. Would you explain that? A. Yes sir. We participated in the interest charges made to the customer, and we would get a larger portion of those charges from the banks than from the finance companies.

Q. All right. Now, what banks did you use in early 1960? A. I initially started with United California Bank. We dealt with them briefly, then we transferred our account to Crocker Citizens. We also dealt with Century Acceptance and Pacific Finance.

Q. Both of the latter two were—— A. Finance companies.

Q. Finance companies. All right. Now, prior to 1964, Mr. Shahood, did your company in fact borrow from banks for capital purposes? A. No sir.

Q. Did you personally borrow commercial loans to be used by your company for any purpose? A. From banks?

Q. Yes sir. **[1437]** A. No sir.

Q. Now, do you recall generally speaking when you started your relationship—when your company started its relationship with Crocker Citizens National Bank? A. Yes sir.

Q. And what year was that, sir? A. In 19— late 1961.

Q. And after that date, did your company have certain dealings with Crocker Citizens? A. Yes sir.

Q. Would you describe the nature and extent briefly of those dealings? A. We held our commercial account there, and we discounted contracts with them, sold contracts with them under their bank-away plan.

Q. You call that the bank-away—— A. Bank-Away plan. That was the term they used for their commercial—their retail financing. We also made loans for vehicles and furniture.

Q. Now, did you borrow money from the bank when you opened—you refurbished and opened up your main office in Stevens Creek? A. Yes.

Q. And which bank? A. Crocker Citizens.

[1438] Q. Do you recall the extent of that loan? A. Yes sir.

Q. How much was that? A. $80,000.

Q. And what year was that given? A. That was in 1964.

Q. All right. Now, in 1964, did your company have any commercial loans with Crocker Citizens? A. Early part of 1964?

Q. Yes. A. Not in the early part.

Q. How about later in 1964? A. Yes sir.

Q. Do you recall the extent of that? A. We borrowed $10,000 on a capital loan.

Q. Was that repaid as agreed? A. Yes sir.

Q. And did you ever have any wholesale financing line with Crocker Citizens? A. Yes sir, late in 1964.

Q. Was it after or before the Maguire plan was accepted? A. After the Maguire plan was accepted.

Q. All right. And what was the line of credit with Crocker Citizens Bank instituted for Continental TV? A. Purchasing products from Kemper and Barrett Distri- [1439] butors.

Q. And what was the amount of the line? A. $30,000.

Q. Now, through the years that Continental TV, Inc., and its affiliates were in business and are in business, has any bank refused to discount Continental's consumer paper, at least prior to October of 1965? A. No sir.

Q. Now, do you recall when you first were introduced to the Sylvania people? A. Yes sir.

Q. At about when was that? A. That was in March of 1964.

Q. Could you describe the circumstances of that first meeting? A. Yes. I had just previously leased the premises in San Leandro. The products I bought with the leasing of the merchandise (sic) were primarily Curtis Mathis. There was a Curtis Mathis dealer in the neighboring town of Hayward, and I stopped in to look at his line and ask some questions about Curtis Mathis, and there I met Lee French.

* * *

[1450] * * * Q. Mr. Shahood, after Continental T.V., Inc., undertook the Sylvania line, sir, did it continue the same promotional method of selling that it had used until that time? A. Yes, sir.

Q. Did it continue the same line of advertising to attract customers that it had used previously? A. Yes, sir.

Q. Now, in Continental T.V.'s experience, did you have any rule of thumb as one of the management personnel as to how large a market area each of your stores could cover, sir? A. Yes, sir.

Q. Would you tell us about that. A. Approximately within a 25-mile radius of our location.

Q. Now, was that your personal opinion? A. It was the opinion of our management.

Q. And also your own? **[1451]** A. Yes, sir.

Q. Had any of your stores in 1964 attempted to attract customers through advertising or whatever at a greater distance from the store than 25 miles or so? A. No, sir.

Q. Mr. Shahood, at any time in 1964-1965 or for that matter thereafter, did any of your chain of stores sell in volume to customers located more than 25 or 30 miles away from the store location? A. No, sir.

Q. Why not? A. It was economically impractical to do so.

Q. Would you explain that. A. Yes, the cost of the salesman going out to that distance, delivery, and there are extensive costs in servicing television sets that were sold at distances greater than this, and economically it just wasn't good business.

Q. Do you have any personal knowledge as to the effective radius from a practical standpoint where the majority of your sales occurred? A. Yes.

Q. Would you tell us about that. A. It is within a ten-mile radius of the location.

Q. How did you determine that? **[1452]** A. We made studies from time to time utilizing maps and the locations of the sales from our particular facilities.

Q. Now, at some point in time we understood that Continental T.V., Inc., did accept the Maguire financing plan. Do you recall that? A. Yes.

Q. Did Mr. French after the Berkeley convention in 1964, after that time, did he talk to you subsequently about the use of the Maguire plan? A. Yes, sir, he did.

Q. Can you tell us to the best of your present recollection what he said. A. He solicited us on this plan continuously, telling us that if we utilized this plan we would be able to expand in our market, that we would be able to buy in larger volumes that we would get better pricing, earn discounts on our purchases.

Q. Do you recall about when it was that Continental T.V., Inc., accepted the Maguire plan? A. Yes, sir.

Q. When was that? A. The middle of July 1964.

Q. Did you personally sign the Maguire plan documents on behalf of Continental T.V.? A. Yes, sir.

[1453] Q. Now, did Mr. French at or near the time that you signed these documents, did he say anything to you about the terms of the Maguire plan? A. Yes, sir.

Q. Would you tell us as best you now recall it what Mr. French said about that subject. A. Yes. He

said that we would be able to have the merchandise in our locations for a period of four months with no charge, no flooring charges, and that that would be two additional months at a small interest charge for keeping the merchandise. We would be entitled to two 30-day renewals after the four-month period. At the end of six months we would have to pay for the merchandise if we still had it.

Q. Okay. Now, did you have any discussions with any of your personnel respecting the terms as you understood them? A. Yes.

Q. Who did you talk to? A. Mr. Savage, our internal bookkeeper.

Q. Cal Savage? A. Yes.

Q. What did you instruct or tell Mr. Savage? A. I told him to set up our books. We used the ABC [1454] card system. We used the C cards to reflect that we received the merchandise, and he set up his books so that we would know the aging of the merchandise from the day we received it.

Q. All right. Now, to your personal knowledge, Mr. Shahood, did Continental T.V. consistently date the maturities using that method from that time until the termination of your company by Sylvania? A. Yes, sir.

Q. Did anybody from Sylvania at any time ever tell you personally that you were dating the maturities, your company was dating the maturities improperly? A. No.

Q. Did anybody from the Maguire Company ever tell you that? A. No.

Q. Now, at some point in time did you meet Mr. Pedlow, the vice-president of Maguire Company? A. Yes.

Q. Do you recall about when that was? A. It was a short period of time after we accepted the Maguire plan. I don't know the exact date.

Q. Sometime in 1964? A. Yes.

Q. What did you understand the purpose of his visit [1455] to be, sir? A. Primarily public relations, to meet our people, to look over our system.

Q. And which facility did Mr. Pedlow visit? A. The store at 3585 Stevens Creek Boulevard.

Q. That was your main office at that time? A. Yes.

Q. And to your personal knowledge, what did Mr. Pedlow do while he was there? A. He spent some time with me and he spent some time with Mr. Savage going over our inventory control system and our methods of remittance to Maguire and how we had set them up.

Q. Did Mr. Pedlow make any comment to you of any kind about Continental T.V.'s procedures? A. Not that I recall.

Q. Any complaints? A. No, sir.

* * *

[1460] * * * Q. Now, do you recall when Continental T.V. San Francisco store was opened? A. Yes.

Q. When was that? A. In September of 1964.

Q. Did the fact that Continental T.V. finally accepted the Maguire plan have any influence on the

entry into the San Francisco market? A. Yes, it did.

Q. Would you explain that? A. Initially we intended to go into San Francisco with a small showroom type store much like the one in San Leandro, approximately 2,000 square feet, with a small display of merchandise and two or three salesmen. With the acceptance of the Maguire plan a large volume of merchandise would be made available to us for display, we re-evaluated our plans for San Francisco and leased a large facility on Geary Street, approximately 6,000 square feet, much with the same type of display space and showroom space, service **[1461]** facility, office facility that we had in Santa Clara.

Q. All right, sir. Did Continental T.V., Inc. open that store? A. No, sir.

Q. Who was the owner and operator of that store, sir? A. A corporation called A & G Sales.

Q. Did A & G Sales purchase or lease the premises? A. A & G Sales leased the premises.

Q. Now, why was a separate corporation utilized in that way? A. Different principles were involved. The other members of my family invested and bought stock in this corporation.

Q. Who were they, sir? A. My brother-in-law and my sister.

* * *

[1463] * * * Q. By this time in the fall of 1964, had you had general discussions with anybody in Sylvania about expansion in California? A. Yes.

Q. Who did you talk to generally about expansion of your chain? A. Mr. French and Mr. Carroll.

Q. Will you tell me first what the market areas were discussed with those two gentlemen? A. We discussed most of the major market areas in Northern California.

Q. Can you give us an idea of the city market areas by name? A. Oakland, Fremont, Salinas, Fresno, Stockton, Sacramento.

[Continued on next page; nothing omitted.]

[1464] Q. All right. What did Mr. Carroll say in general about the concept of expansion? A. He was in favor of the expansion. There were areas that he told me Sylvania needed help in.

Q. Did he say anything at that time about Sacramento? A. I don't recall.

Q. Mr. French, did he say anything in particular about this subject? A. I don't recall.

Q. All right. Was there any discussion in 1964 about possible expansion into the Los Angeles markets? A. I don't recall whether it was '64 or '65.

Q. All right. Do you recall that in 1964 some time you met Mr. Callahan? A. Yes, sir.

Q. Do you recall about when that was? A. The middle of November of 1964.

Q. All right. What was your understanding of the purpose of his visit? A. My understanding was that he came out to meet our people. Look over our operation and make a general **[1465]** survey of Continental T.V., Incorporated and its people.

Q. Did you have a discussion with him on that occasion? A. Yes, sir.

Q. What subjects were discussed, Mr. Shahood? A. Our credit lines, our method of remittance, our

inventory control systems. And we also discussed the float that Continental was utilizing in paying—making remittances to Maguire.

Q. All right. Let's make the first. I think you mentioned the credit line. What did Mr. Callahan say about the credit line? A. Well, he said that Lois Barnes had, to the best of my recollection, had raised it to 200,000, and he came out to see why. And we went into it a little bit. We discussed volume and expansion and the amount of business we were doing at the time, and Mr. Callahan felt that a $200,000 credit line wasn't adequate for our needs at that time, and he raised it to 300,000.

Q. On that occasion? A. Yes, sir.

* * *

[1508] * * * Q. Mr. Shahood, we understand you attended the Chicago convention given by Sylvania? A. Yes, sir.

[1509] Q. Prior to leaving for that convention did you have any plans to go to the Philco convention? A. Yes.

Q. And did you intend to do so before you left for Chicago? A. Yes.

Q. Now, you attended, I believe, a credit meeting while in Chicago? A. Yes.

Q. Who was present, to the best of your recollection, from Sylvania? A. Mr. Lockard, Mr. Callahan, Mr. Rivers, Mr. Lopolito, Mr. Carroll.

Q. All right, sir. And was there anyone present from the Maguire Company? A. Mr. Don Pedlow.

Q. Now, would you tell us, to the best of your

recollection, the subjects discussed, please? A. Yes. Continental T.V.'s credit line, their method of payment, the extensions and maturities, the advertising credits that were due us, damaged merchandise, and the lock box in San Francisco, and floor checks.

Q. All right, sir. And sometime after the Chicago credit meeting did [1510] you receive a letter from Mr. Lockard? A. Yes.

Q. Let me show you Exhibit BG and ask you if you recognize that, being a cover letter to yourself and having attached three or four page letter from Mr. Lockard directed to Mr. Pedlow? A. Yes, sir.

Q. All right, sir. Now, in this letter Mr. Lockard tells Mr. Pedlow of, number one, the extensions which he granted to Continental T.V. on 60 color T.V. sets; is that right? A. Yes, sir.

Q. Number two, he makes an arrangement for maturity payments. And would you tell us what he says, in substance? A. In substance he said that teh maturity that occurred up to June 1st of that year would be paid on June 22nd, and that any maturities that occurred during the month of June after June 1st would be paid on July 22nd.

Q. All right, sir. And, to your knowledge, did Continental T.V., Incorporated, comply with that payment schedule for maturities? A. Yes, sir.

Q. Now, Mr. Lockard tells Mr. Pedlow also that [1511] Maguire should not schedule audits on the day after a weekend or the day after a holiday. That's point 3, correct? A. Yes, sir.

Q. And that was discussed at the meeting? A. Yes.

Q. And point 4 is that Continental T.V. will commence using the lock box in San Francisco? A. Yes, sir.

Q. And, as a matter of fact, to your personal knowledge, did Continental T.V. thereafter use the lock box? A. Yes, sir.

Q. And, consistently? A. Yes.

Q. Now, point 5 is an agreement regarding the SAU schedule? A. Yes.

Q. All right. Would you explain to us what you understood that arrangement to be? A. That Continental T.V. would remit to Maguire for items sold, transactions completed on a Friday through the Friday of the previous week.

Q. So that transactions occurring until one Friday [1512] would be paid the next succeeding Friday? A. Yes, sir.

Q. All right. Leaving some delay of a maximum of 13 days maximum? A. Yes, sir.

Q. Why was that arrangement worked out in Chicago? A. In order to give Continental T.V. and its affiliates sufficient time to process the paper work involved in these transactions.

Q. All right. Now, were there any other subjects discussed at this credit meeting other than those specified in this Exhibit BG? A. Yes. The surprise audit.

Q. That was discussed? A. Yes.

Q. All right. What did you say at that meeting about that? A. Well, I spoke to Mr. Lockard about it again. I told him that I was angry about it. He admitted to me that he had done it in anger and

retaliation at my refusal to send the checks to the San Francisco lock box.

Q. All right. Now, was there any mention of entry into the [1513] Sacramento market made at the Chicago convention? A. Yes.

Q. And to whom? A. Mr. Carroll and Mr. French and Mr. Hines.

Q. And did you comment to these gentlemen about that subject? A. Yes.

Q. What did you tell Mr. Hines? A. I told him that Continental T.V. had plans to enter the San Francisco market—the Sacramento market.

Q. Was Mr. Carroll and Mr. Hines present at that time? A. Yes.

Q. What did Mr. Hines respond, if anything? A. He told me that he would be glad to meet with me. He suggested that we meet for lunch in Sacramento with Keith Anderson when we returned to California.

Q. Did you tell Mr. Hines on this occasion anything about the brands that you intended that store would carry? A. No.

Q. Mr. Carroll say anything? A. Not that I remember.

* * *

[1522] * * * Now, from the time of the meeting that you had in Chicago with Mr. Lockard and the other gentleman until the time you placed the Exhibit P order, were you personally aware of any change in the manner in which Continental was making its payments for SAU items? A. No.

(continued on next page.)

[1523] Q. Were you aware of any change in the schedule or the procedure in the way Continental was making maturity payments? A. We were sending the payments now for the San Francisco lock box and there was no change in the way we were paying the maturities.

Q. Did anybody from Sylvania up until the time you placed the July order discuss with you the subject of SAU or maturity payments? A. No.

Q. Did any personnel from Sylvania discuss any other subjects with you other than what you have testified to during that period? A. I had a meeting with Mr. Lopolito. I can't pinpoint the time, whether it was at the time I signed this order, before or shortly after.

Q. All right, sir. A. But it was in this period of time.

Q. What subjects were discussed with Mr. Lopolito on that occasion? A. We discussed the—primarily we discussed the credit relationship that Continental T.V. would have with Sylvania in the future and that it was to be handled by Mr. Lopolito entirely.

Q. And he told you that on that occasion? [1524] A. Yes, that we were no longer to contact Batavia.

Q. Between the time of the credit meeting in Chicago and the time of this July order, sir, did anybody from Maguire Company voice any complaints to you personally about your company's performance under their plan? A. No.

* * *

[1531] * * * Q. Mr. Shahood, in the months of either August or September, did you have any further conversations with anybody in Sylvania respecting the subject of entry into the Sacramento market? A. Yes.

Q. Who did you talk to? A. Lee French.

Q. And where did this discussion take place? A. At my store in Santa Clara.

Q. And what did Mr. French say and what did you say in essence? A. In the discussion Mr. French said that he had no authority to franchise Continental T.V. or any of its affiliates in the Sacramento market, it was out of his territory.

Q. Did he say anything to indicate to you how Continental could be approved in Sacramento? A. He told me it couldn't be approved.

Q. At that time did you know who the salesmen in Sacramento for Sylvania was? A. Yes, Mr. Hines.

[1532] Q. Did he say anything about Mr. Hines in this conversation? A. Yes. He told me it would require Mr. Hines' approval, but that we couldn't get it.

Q. Do you recall when this discussion occurred, sir? A. The actual discussion occurred in the early part of September.

Q. All right. Now, at the time of this discussion, was the Sacramento store open? A. No.

Q. Did you ever have any further conversations with any Sylvania personnel about Sacramento? A. Mr. French primarily.

Q. All right. When did the next one occur? A. I believe it was about the 5th of September.

Q. All right. Let's see. Labor Day weekend? A. Yes, just prior to Labor Day weekend.

Q. And where did this discussion take place? A. There were two discussions, one by telephone, and as I recall, I met—from San Francisco, and I met him in my Stevens Creek—in the Continental's facility at Stevens Creek.

Q. Which occurred first, the telephone call or the meeting? [1533] A. The telephone call.

Q. What did Mr. French say? A. He had heard that we had merchandise in Sacramento and that he wanted to know what it was doing there.

Q. What did you tell him? A. I told him that we intended to sell it there and to get me a franchise for the location.

Q. And what did Mr. French respond? A. He said he couldn't get me a franchise, that was Jim Hines' territory, and there wasn't a franchise available.

Q. Did you tell him anything else in that conversation on the phone? A. That wasn't on the phone, that was at our meeting in Santa Clara. We agreed to meet. He had called me up and we agreed to meet at Santa Clara.

Q. The phone call was just an agreement to get together? A. Yes.

Q. All right. So was it the same day that you did meet with him? A. Yes.

Q. And it was at the Stevens Creek store? A. Yes.

Q. At your office? A. Yes, sir.

[1534] Q. And you have related partially Mr. French's conversation at that meeting? A. Yes.

Q. All right. Is there anything else that you recall that Mr. French told you? A. He told me I was foolish, that I was jeopardizing my entire relationship with Sylvania by moving merchandise into Sacramento without having a franchise.

Q. And did you tell Mr. French anything else on that occasion? A. I told him, "Go ahead and try to get me the franchise, if you can't get it, I will move the merchandise out."

Q. All right. And did you again talk to Mr. French after that meeting about the subject of Sacramento? A. Yes.

Q. Did you talk to anyone else in the interim? A. I talked to my attorneys.

Q. All right. And how long after meeting with Mr. French in the Stevens Creek store and how long after talking to your attorneys did you again—was it until you again talked to Mr. French? A. I think it was the following day.

Q. All right. And what did Mr. French tell you on that day? [1535] A. He asked me what I was going to do about the merchandise there.

Q. And what did you tell him? A. I told him that I was going to keep it there, that I had spoken to my attorneys and they told me that it was unlawful for Sylvania to demand that I move the merchandise out, and I was acting on their advice.

Q. All right. Now, what did Mr. French respond when you told him that? A. He told me he thought

I was very foolish, that the relationship with Sylvania was very good, color shortage was coming up, I needed the merchandise, I had just previously negotiated a large order and received a suitable mix, and that I wouldn't get anything if I persisted in keeping merchandise in Sacramento.

Q. Do you recall the date of this particular discussion? A. I believe it was September 6th or September 7th.

Q. Now, when did the Sacramento store first open to the public? A. Day after Labor Day, September 8th, 1965.

Q. Whatever the day was, Tuesday? A. Tuesday, I believe.

Q. Now, the previous large order that you had given Sylvania was for approximately $112,000, Exhibit R. You [1536] gave that on August 27; is that correct? A. Yes.

Q. Did you understand Mr. French to be referring to that order, as well as the unshipped portions of the July order, when he told you that Sylvania would not ship you as long as you persisted in your desire to enter the Sacramento market? A. Yes.

Q. Now, where did the Sylvania merchandise that Continental shipped to Sacramento and displayed, where did that merchandise come from? A. From our warehouse in Santa Clara.

* * *

[1537] * * * Q. Do you recall about when the Vallejo store was opened? A. In October, late October-early November of 1965.

* * *

Q. Now, Mr. Shahood, in your discussions in early September with Mr. French, did you mention the subject of Vallejo? A. Yes.

Q. And did you make a similar request for a franchise for that location? A. Yes.

Q. And what was Mr. French's response? A. He told me that it was Hines' territory, but he [1538] felt there would be no problem getting the Vallejo store franchise.

Q. All right. Now, were you personally in Sacramento at any time in September of 1965? A. Yes.

Q. And I take it you were at your store location? A. Yes.

Q. Did you have any meeting with Mr. Hines during the time you were in Sacramento during that month? A. Yes.

Q. And where did that meeting take place? A. At the Continental Store on Fulton Avenue in Sacramento.

Q. Now, was that after or before your conversations with Mr. French? A. After my conversations with Mr. French.

Q. And can you tell us about how long after? A. He came in on the day we opened the—it was either the day we opened or the day before—it was the day after, the day after the conversations with French.

Q. All right. Now, did you have a conversation with Mr. Hines? A. Yes.

Q. And what did Mr. Hines tell you? A. He came in and he asked me what the Sylvania [1539]

merchandise was doing on the Continental floor and in Sacramento.

Q. What was your response? A. I told him it was for sale.

Q. And what did he say to that? A. He said that we couldn't have it there, we weren't franchised, that he didn't want us there.

Q. Was that the substance of everything he told you? A. He told me that he had large commitments that he had made with Keith Anderson of Handy-Andy and that our entry into that market jeopardized his relationship with Mr. Anderson. He also told me that Mr. Anderson was on the phone to Batavia screaming about the fact that we had merchandise in Sacramento.

Q. Did he make any reference to credit in respect to the merchandise you had on the floor? A. He told me that the merchandise in Sacramento was out of trust.

Q. Did he use that term? A. Yes.

Q. Okay. Let me show you Exhibit EH, which is a letter dated September 7, 1965, to Mr. Gene K. Beare, president of Sylvania Electric Products, from Sidney Rudi, attorney at law in San Francisco. Do you recognize that letter? **[1540]** A. [Examining] Yes.

Q. All right. Under what circumstances was this letter sent? A. I had told Mr. Rudy about our entry into the Sacramento market and Sylvania's refusal to franchise Continental T.V. in that market and their demand that we had to remove the merchandise from there, and Mr. Rudy advised me that Sylvania's conduct was unlawful and that he was going to advise them.

Q. And this is the letter Mr. Rudy wrote, to your knowledge, as a result? A. Yes, sir.

Mr. Miller:

"Dear Mr. Beare: This office represents Continental T.V., a California corporation, and Mr. White of this office is the secretary of the corporation.

"Continental T.V. has for some time been a franchised dealer in five locations in the Central California area. Your records will show that a very large volume of business has been done by Continental T.V. in the sale of Sylvania Home Electronics Products. The advertising program of Continental T.V. has been instrumental in establishing the Sylvania line in this area.

"Some two weeks ago Mr. Shahood routinely **[1541]** requested your representative, Mr. Lee French, to clear the franchise for Continental T.V. of two additional locations covering stores to be opened in Sacramento, California, and Vallejo, California. We assumed that the franchise would be cleared in due course as they have been with respect to the other locations which were opened and merchandise has accordingly been shipped and placed in the Sacramento store.

"Today Mr. French advised by telephone that no franchise would be cleared in Sacramento or Vallejo, that any merchandise moved into the Sacramento store would be treated as out of

trust and that Mr. Shahood was to remove all of the new Sylvania merchandise from the Sacramento store.

"We shall continue to assume that the franchising of the two new locations will be cleared promptly. Perhaps what has been done to date has been done on the initiative of your sales department without consultation with your office or your legal department. May I suggest that this matter be given your immediate attention and that we receive prompt advice that the franchising in Sacramento and Vallejo is approved.

"If for any reason you wish to discuss this matter **[1541-A]** with me please feel free to telephone me. Yours truly, Sidney Rudy."

A copy to George Shahood.

Your Honor, we would offer this as Claimant's next in order as marked.

[Continued on next page; nothing omitted.]

[1542] * * * *Voir Dire Examination*

By Mr. Popofsky:

Q. Mr. Shahood, Mr. Rudy is a most distinguished practitioner in Sacramento to your knowledge, is he not, to mine as well? A. He is an attorney.

Q. My question to you about Exhibit E-H, is the following: Did you on behalf of Continental TV authorize Mr. Rudy to transmit this letter? A. Yes, sir.

Q. Was it your custom to authorize Mr. Rudy to deal with such parties as Sylvania Electric or other third parties on behalf of Continental TV? A. Mr. Rudy could deal with anybody at any time when he felt it was necessary on behalf of Continental TV.

Q. And if he took action on behalf of Continental TV it was within the scope of your authority? A. Yes sir.

Mr. Popofsky: No objection, Your Honor.

The Court: Admitted.

The Clerk: Exhibit E-H introduced in evidence.

[1543] [Claimant's Exhibit E-H received in evidence.]

Direct Examination [Resumed]

By Mr. Miller:

Q. Now, Mr. Shahood, did you after talking to Mr. Hines in Sacramento again talk with Sylvania personnel during the month of September? A. Yes.

Q. Who did you talk to? A. Mr. French.

Q. Where did this discussion take place, sir? A. I spoke with Mr. French in many different places at many different times during the month of September.

Q. Can you generally relate for us the substance of what Mr French told you on these occasions? A. Mr. French told me practically on every occasion that I was acting very stupidly and very foolishly, that I was jeopardizing my entire program with Sylvania and that I was jeopardizing Continental TV's business, our future, and that I was foolish not to withdraw from the Sacramento market and re-establish my good relationship with Sylvania.

Q. All right. Generally speaking, what was your response on these occasions? A. I refused.

[1544] Q. Now, beside Mr. French did you talk to anyone else connected with Sylvania during the month of September? A. I don't recall.

Q. Let's go back a minute to Mr. French. Did French at any time in September mention the subject of credit review or credit problems to you? A. Yes.

Q. What did he say? A. I continually asked him whether I was going to get any shipments. He told me that he had been instructed by Batavia to tell me in the event that I asked what was happening to the shipments that he was going to tell me they were being held for credit review.

Q. All right. Now, did you attempt to give an order for merchandise to Mr. French for Sacramento? A. Yes.

Q. Would you tell us the circumstances of that incident? A. Mr. French came into my store, the Continental TV facility at Stevens Creek one day, and I told him I wanted to submit a franchise order for Sacramento. He told me that he couldn't take it. I told him I was going to give it to him anyway and I asked him to give me his order book. He wouldn't give it to me. I had Mr. Savage [1545] type up an order. While he was there I asked him to contact Ken Lopolito for me.

Q. Did you in fact get to talk to Mr. Ken Lopolito? A. Yes.

Q. Had you attempted to talk to him earlier? A. For some two or three weeks I placed calls daily to Mr. Lopolito's office.

Q. Now, what did you say to Mr. Lopolito on the phone that day? A. I asked him if he would approve the order I had placed for $112,000 and forwarded. He told me he had in fact approved it and forwarded it to Mr. Steiner. I asked him if there were any credit problems he knew of with Continental TV and he told me there was none. I asked him if there was any reason why a $75,000 or $80,000 order that we were placing for our Sacramento store couldn't be approved for credit. He told me there was no reason at all why, no credit reason why that that couldn't be approved.

Q. Did Mr. French leave the store with the Sacramento order that you had typed? A. Yes.

Q. Now, did you talk to Mr. Lockhart during the month of September? A. Yes, I did.

[1546] Q. Did he call you or did you call him? A. He called me, as I recall. I believe it was September 15 or 16.

Q. What was the subject of the discussion? A. He called me to tell me that the subject of discussion was our payment in compliance with the June 21 letter and our credit line.

Q. What did he say about Continental's performance under the agreements arrived at at the June convention? A. He said we weren't complying with them.

Q. Did you have personal knowledge at the time of that call as to whether or not Continental was in fact complying? A. It was my personal opinion that we were complying with.

Q. What did you do when he told you that on the phone? A. I got Mr. Savage on the phone and I told him that it wasn't true that we were complying with the terms.

Q. What was Mr. Lockhart's remarks after Mr. Savage talked to him on the phone? A. It was negative reaction. He said we weren't doing it. He informed me that he was cutting our credit line from $350,000 to $50,000.

Q. He told you that on the phone? A. Yes.

Q. Did you thereafter receive a letter from Mr. [1547] Lockhart respecting the subjects discussed on the phone? A. Yes.

Q. I show you Exhibit C-A, a letter directed from Mr. Lockhart to Mr. Pedlow at Maguire Company, dated September 16, in which he discusses the subjects which you have related. He says:

"Reference is made to my letter of June 21, 1965 which summarizes the meeting held in Chicago in early June with Mr. George Shahood of Continental TV.

"I note that your statement does not reflect the additional two months of free flooring which was granted on approximately 60 color TV sets (paragraph 1 of my letter).

"As far as I can tell, this deal with trust receipt numbers"—then he goes on and states the numbers—"your prompt adjustment of your records to reflect the true situation will be appreciated.

"I want to emphasize paragraph 2 in my letter from which I quote as follows:

'In the future, all maturities are due on the date the trust receipts do mature, ——'

"I recognize that paragraph 2 of my letter indicated that payment would be permitted by the next following Friday but I will comment further on that as part of my reference to paragraph 5.

[1548] "Paragraph 3 dealing with the day of the week for Maguire audits is to continue in effect.

"Paragraph 4 dealing with the use of the San Francisco lock box depository will remain in effect.

"Paragraph 5 deals with the timing of payments to Maguire by this account. In view of the fact that the procedure which was set up has not been successful in clearing items 'past due and not subject to renewal', the usual Maguire payment schedule should be enforced.

"I expect to try and reach Mr. Shahood today on the phone and discuss this matter with him.

"Thank you very much for handling this on behalf of J. P. Maguire & Company.

"Kindest personal regards,

"J. Lee Lockhart."

Copies were sent to Mr. Rivers, Mr. A. D. Russell and to Mr. George Shahood. Now, do you recall receiving a copy of that letter, Exhibit C-A? A. Yes. I received a copy.

Q. Now, let me show you another copy of the same letter, Exhibit C-D. At the end of this letter there is

a hand-written postscript dated 9-16, apparently in Mr. Lockhart's handwriting, which says:

> **[1549]** "Talked to George Shahood per contents of letter. Advised him that I would be sending him a copy. Reduced credit line to $50,000. Reasons: Published statements given [sic] to maturities have piled up, adverse information available that was not available when the credit was extended, advised by George Shahood will see you in Court."

Now, were these comments in Mr. Lockhart's handwriting on the copy of this letter which you received? A. No, sir.

Q. Now, did you in substance tell Mr. Lockhart if he persisted you would see him in Court? A. Yes, I did.

Mr. Miller: Your Honor, at this time we would offer Exhibit C-A as Claimant's next in order.

The Clerk: Exhibit C-A introduced and admitted in evidence.

[Letter marked Claimant's Exhibit C-A received in evidence.]

* * *

[1555] * * * A. Now, Mr. Shahood, how would you describe the color television market in your various market areas as of October, 1965? A. It was a very unique time in our business and our history of the television industry.

Q. How so? A. The demand for color television far exceeded both retailers, distributors and manufacturers ability to supply the demand.

Q. To your knowledge, had that condition ever existed previously at least while you were a T.V. retailer? A. No, sir.

Q. How long did that condition exist to your personal knowledge? **[1556]** A.. From October through the end of 1966.

Q. Has that situation ever existed since that time to your knowledge? A. No, sir.

Q. Now, was the balance of that July order or any part of the August order ever shipped to Continental's chain of stores? A. No, sir.

Q. Any part of the Sacramento order ever shipped? A. No, sir.

Q. What did the chain do for merchandise thereafter, Mr. Shahood? A. We made every attempt we could to get merchandise but we couldn't get any.

* * *

[1559] * * * Q. Now, Mr. Shahood, where were you on October 11th at the time of the repossessing action? A. I was driving from Continental T.V.'s store in Santa Clara to the Continental T.V. store in Salinas.

Q. All right, sir. And when you arrived in Salinas was the repossession under way? A. Yes. The Federal Marshals were repossessing merchandise from our store there.

Q. All right. Now, did you have any discussion with any representative from Sylvania and Maguire who was at that location? A. Well, a brief comment from Mr. Lopolito.

Q. What did Mr. Lopolito say? A. He told me, he said, "I am sorry, George, but what can I do?" And I made no comment.

Q. All right. Now, did you come back to San Jose? A. Yes.

Q. And did you cooperate generally with the repossession? A. I stayed out of it completely.

Q. Now, generally speaking, what was Continental [1560] T.V. Incorporated and its affiliated companies financial condition the day of the repossession? A. We were in better financial condition than we had ever been at any time in the history of our existence.

Q. All right. Approximately how much cash did Continental T.V. Incorporated and its affiliates have in the bank as of that date? A. I would estimate approximately $150,000 in our commercial accounts.

* * *

[1561] * * * Q. Now, Mr. Shahood, were your stores—strike that. Did your stores remain open on the 13th of October? A. Not all of them.

Q. What happened? A. The main store in Santa Clara was chained and padlocked. We were told to leave the store, by the Federal Marshals. They chained and padlocked it. Our warehouse was chained and padlocked at Laurel Road in Santa Clara.

Q. All right, sir. How long did they remain closed? A. Until the next day.

Q. And what did you do to reopen them? A. I posted approximately $100,000 cash bond to reopen it.

Q. To release the attachment? A. To release the attachment.

Q. And you got that up by the next day? A. Yes, sir.

* * *

[1569] * * * Q. All right. Now, what happened to Continental's expansion plans after October of 1965? A. There were no expansion plans. Everything was canceled out, and we in fact started closing stores down.

Q. Which stores were closed, sir? A. From October of 1965 through 1966 the Vallejo store was closed. The Sacramento store was closed, the Oakland store was closed. Ultimately, the San Francisco store was closed, the Salinas store was closed and we remained with the store in San Jose at 3585 Stevens Creek.

Q. What caused the closings? A. We had no merchandise to sell. We lost a lot of money.

* * *

[1578] * * * Q. Now, you opened your original store in West [1579] Santa Clara? A. Yes, sir.

Q. And thereafter from 1961 to 1964 you essentially handled Muntz T.V.? A. Yes, sir.

Q. And along the way you picked up Dumont and Emerson? A. Yes, sir.

Q. Now, during the course of this period you also opened up—and forgive my geography—in Sunnyvale, somewhere in here? A. Yes, sir.

Q. You opened a leased premises there? A. Yes.

Q. And sold for three or six months and then closed up shop? A. Yes, sir, I did.

Q. During this same period of time you opened a premises down in Salinas on a lease basis? A. Yes, sir.

Q. You opened that for a few months and closed it up as well? A. Yes.

Q. You also opened up in Redwood City, did you not? A. Yes, sir.

[1580] Q. And finally in early 1964 you opened up in San Leandro? A. Yes, sir.

Q. Over in the East Bay. So during the three or four years you used the lease device to open and close stores as you determined it was in the best interests of Continental T.V.? A. Yes.

Q. Now, is it not a fact that aside from your principal headquarters operation and perhaps your warehouse facility all the subsequent stores of Continental T.V. were opened on a lease basis as well? A. I don't know whether they were all opened on a lease basis. I think we rented some on a month-to-month basis.

Q. But you understood, did you not, from 1961 forward at all times that as a dealer engaged in the sale of retail of T.V. products you had this option available to open a retail operation by renting a space, maybe month-to-month, virtually anywhere in your general trade area and you took advantage of this in the early Sixties and you took advantage of this in the mid-Sixties? A. Yes.

* * *

[1595] * * * Q. Now, in fact, when you went into the Sylvania **[1596]** line and became a dealer your

general practice throughout your chain was to sell from 50 to 100 above suggested retail? A. In areas we did.

Q. In most of your areas? A. I don't know whether we did it in most of our areas. I would say in most of our areas we did. We sold in many cases higher than the suggested list.

Q. All right. And Sylvania didn't complain to you that you were selling 50 to a hundred dollars on an average higher than the suggested retail, did they? A. No, they made no complaint as long as we didn't sell below the minimum price they set.

Q. But you weren't interested in selling below the minimum on any occasion, were you? A. No, sir.

Q. At least not until after the rupture of relationships and you sold the distress merchandise you still owned? A. I don't know what you are referring to.

Q. All right. I will withdraw that, sir. Is it not a fact, Mr. Shahood, that at no time **[1597]** during any of the conversations concerning Sacramento, or during the September or October affair was price mentioned? A. I don't understand the question. I am sorry.

Q. Is it not a fact, sir, that you did not have any conversation during the months of September and/or October concerning Sacramento which involved the subject matter of price?

Mr. Miller: What year was that, counsel?

Mr. Popofsky: 1965.

The Witness: That's true.

Mr. Popofsky: Q. That is true. All right. Now, in connection, sir, with these post-May conversations

with Mr. French and Mr. Carroll you were told, were you not, that Sylvania had not objection to your carrying competing lines? A. That's true.

Q. In fact, Sylvania was going to go into your stores with other lines already on the floor? A. Yes, sir.

Q. And while Philco came along 10 months later no objection was expressed by Sylvania? A. That's true.

Q. Now, sir, you were also told, were you not, that it was part of the elbow room philosophy, this limited **[1598]** distribution system philosophy, to give you a courtesy notification in the event that Sylvania had decided to put a new dealer on in your general trade area? A. That's true.

Q. And at all times thereafter it was your understanding, was it not, that if dealers were being franchised that Sylvania would, as a courtesy, let you know about it? A. Yes, sir.

Q. But they didn't ask you to approve? A. No, sir.

Q. And they didn't extract any promise from you to approve any decision they had made with respect to putting a new dealer on? A. That's true.

Q. All right, sir. Now, also in connection with this limited distribution system that was described to you, is it not a fact that you were—you understood from the descriptions that you could sell anywhere to any consumers whatsoever who happened to be in your general trade area or that you could reach? A. That's true.

Q. No one told you that you were restricted to any defined territorial area, or to any category of customer? **[1599]** A. That's true.

Q. And, in fact, once you went into business with Sylvania, you, in fact, made sales from time to time quite beyond the 25 mile radius that you spoke of yesterday? A. Yes.

Q. I will show you, sir, just to—so the point is beyond doubt, Exhibit 41, which I would l like to ask you to identify for us. I think these are your—can you identify for us, sir? A. Yes.

Q. What are they? A. They are copies of our delivery and installation sheets for A & G Sales for the month of April, 1965.

Q. All right, sir. Now, glancing through these delivery sheets. What do they show, by the way? A. They show the name of the customer, the date, the customer's address, the delivery date, the model sold, the serial number of the merchandise, our inventory control card number, and the last sheet—the last number is what we call a UARCO number, which identifies the purchase order it was written up on.

Q. Okay, sir. Now, it is not a fact these sheets show the **[1600]** actual delivery of the T.V. set to a customer to whom you had sold? A. Not in all cases, sir.

Q. There are a few other dealers to whom you make shipments as well. A. Yes.

Q. Passing the other dealers, the rest are consumers, right? A. Yes.

Q. By and large? A. Yes.

Q. All right. Just glancing through these—by the way, where did A & G Sales sell from? What location, in April of '65? A. In April of 1965, in Oakland and in San Francisco.

Q. In Oakland and San Francisco. Okay. If you will just flip with me, sir, I see on page 1 sales in Petaluma, which is some 30-40 miles north? A. On page 1?

Q. Yes.

Mr. Miller: Counsel, did you say sales or delivery?

Mr. Popofsky: Delivery.

Q. Do you notice that one reference number 642?

[1601] * * * Mr. Popofsky: Q. Petaluma? A. Yes.

Q. And, let's see—A. I might comment here at this time that all these don't indicate that the set was delivered. In many instances customers picked up sets from our stores. They came into our stores and picked up merchandise in our stores.

Q. Would they still have a driver listing? A. On this, I don't know what the driver listing is I can't make out that. And that may well have been delivered. I wasn't isolating that.

Q. Fair enough. Well, wouldn't it be more logical to assume that the delivery sheets demonstrates or evidences actual deliveries by a driver of Continental T.V.? A. If a driver was noted.

Q. Right. I think there is a driver number listed in all of these pages, is there not? A. No, it isn't a driver number. Even though it has driver there that's not the driver number, that's the number of the UARCO which identifies the day we deposited the

money and the purchase order that was written up and forwarded to our accountant.

Q. All right. **[1602]** Well, not to belabor the point, Mr. Shahood, if you will just glance through these sheets, is it not a fact that from your locations in San Francisco and Oakland sales are made whether actually delivered or picked up by the consumer, in such places as Petaluma, San Rafael, Santa Rosa, Benetia, Napa, Fairfield?

* * *

Q. And East Palo Alto and Novato.

* * *

Mr. Popofsky: I have not finished the question. The Fairfield one being another T.V. dealer. Now, have I satisfied your problem?

* * *

The Witness: Could I examine these for a minute, counsel, please?

Mr. Popofsky: Q. Surely. You certainly may, sir. A. I would say that five out of 114 sales, that's five out of 114 were delivered outside the 25 mile limit, and that probably 80 percent of them were delivered within **[1603]** 10 miles of the store.

Q. I will accept that, Mr. Shahood. I would like to move the admission of this into evidence, Your Honor.

* * *

The Clerk: Exhibit 41 introduced and admitted in evidence.

(Defendant's Exhibit 41 marked and received in evidence.)

Mr. Popofsky: Q. Insofar as there were limitations upon the area into which Continental T.V. might sell Sylvania or any other merchandise, that was based on management's decision, as you explained it yesterday, was it not? A. Yes.

Q. That economically Continental T.V. felt it was more desirable to focus on its local trade area? A. Yes, sir.

* * *

[1612] * * * Q. Mr. Shahood, we come to Young Brothers. Remember when you first became concerned about Sylvania franchising Young Brothers? A. Yes.

[1613] Q. When was that, sir? A. I think it was in March of 1965.

Q. In March of 1965 you got wind that Mr. Carroll was thinking about a new dealer in the San Francisco area, Young Brothers? A. Yes.

Q. Young Brothers had stores on Mission Street and Geary Street; is that correct? A. Yes.

Q. You were concerned because you had opened or were about to open a new store on Geary Street? A. No, not—not at that time. I was already opened on Geary.

Q. You were already open on Geary Street? A. Yes, sir.

Q. So you were concerned about a new dealer coming into the San Francisco market? A. Yes.

Q. All right. Now, at that time you had placed an order for 200 TV sets which had not yet been shipped; is that correct? A. Out of line merchandise.

Q. Out of line merchandise? These were Sylvania sets? A. Yes.

[1614] Q. When you heard that Don Carroll was thinking about franchising Young Brothers, you called on Lee French and said, "Hold my order."? A. Yes.

Q. Or words to that effect? A. Yes.

Q. And what were your reasons for that? A. This was a large commitment, 200 color sets of an out-of-line model. It was my intention at the time to merchandise the majority of this—these models out of my San Francisco store, and it was just the management concern over ability to move merchandise in a location where they intended to put a dealer on right down the street from me. That was one of my concerns.

The other concern was that they had represented to me in their elbow room policy that they wouldn't put a competitive dealer in the area—in my immediate trade area in competition with me, and I also felt that this wasn't in keeping with their representations.

Q. All right. Now, this followed this Mission Street incident by what, six, seven months, the opening of your Mission Street store? A. I would say so.

Q. Now, when you asked Sylvania to hold that order that you had placed for the 200 out-of-line sets, you **[1615]** understood that that was within your prerogative, did you not? A. Yes.

Q. And you understood, did you not, that you could stop buying what—any Sylvania whatsoever if—if you elected to, should they put Young Brothers on? A. Yes, sir.

Q. And in fact, from March to May and up until June of 1965 you told anybody at Sylvania who would listen that you did not want Young Brothers fran-

chised in San Francisco? A. I wouldn't say that's a true statement.

Q. Perhaps I'm overstating it. You told Mr. Lopolito, for example. A. I told him in June, I believe, in May or June of that year.

Q. Exhibit 31 in evidence is a memorandum of May 10, 1965 from Mr. Lopolito, in which he describes a conference with you, and he states, among other things, as follows:

> "Shahood explained his position this way. His advertising of Sylvania reaches the entire Northern California area. He uses every medium possible including a weekly ad in the Northern California edition of TV Guide Magazine. He contends that his ads sell a great deal of Sylvania merchandise for other dealers. He also claims that Young Brothers will ruin the market due to price cutting. He stated that if we sign Young Brothers he is **[1616]** going to pull all Sylvania sets out of his San Francisco and Oakland locations and cease all advertising in this area."

Does that sound about like what you told Mr. Lopolito? A. I may have told him that. I'd like to explain that, if I may, Mr. Popofsky.

Q. You surely may, sir. A. On many of these negotiations, you deal in the best manner you feel you must in order to accomplish what you do. You always don't do what you say you're going to do over the bargaining table.

Q. Playing a little poker, are we? A. I would say so.

Q. All right. I think that's perfectly fair, Mr. Shahood, and you are—were playing poker right up

until June on this Young Brothers business, were you not? A. Not all along, I would say. There were times, yes.

Q. Just prior to June, you had a conference with Mr. Carroll, didn't you? A. Yes.

Q. And is it not a fact that Mr.—you asked Mr. Carroll point blank, "Is Young Brothers being invited to the June show in Chicago?" He told you no. **[1617]** A. Yes.

Q. And Young Brothers was not in fact being invited to the June show? A. That's true.

Q. But I think you saw that as something more. You saw that as an assurance, did you not, that they were in fact not going to be franchised? A. He also told me they weren't going to be franchised, and that he wasn't negotiating with them for a franchise at that time.

Q. Okay. When you got to Chicago you found out—— A. He had lied.

Q. ——that he had lied to you? A. Yes.

Q. At least that is your interpretation of the facts, sir? A. Yes.

Q. And there occurred the incident with the order? A. Yes, sir.

Q. Mr. Carroll popping twice while you were writing up and then the conference after the order was written up. Do you recall that sequence of events for us, sir? A. Yes.

* * *

[1618] * * * Q. Now, in connection with this June Chicago convention, Mr. Shahood, when Mr.

Carroll took you up into your room, you understood that his reason for doing so was to give you an opportunity to tear that order up; is that not so? A. No, sir.

Q. You told us yesterday that he had secured from you a "commitment," I think was the word. A. He had secured my signature in an order.

Q. He had secured your signature in the order, but didn't you understand, as you stood there and told him "Cancel it," that that was exactly what he was giving you an opportunity to do? A. No, sir, he didn't call me up for that purpose.

Q. Well, he was trying to continue to sell you. Obviously he wanted you to stay with the order, right? A. Mr. Carroll I believe didn't expect me to react the way I did.

Q. It is certainly true, is it not, Mr. Shahood, that when you said "Cancel that order," in a somewhat angry manner, that you were acting within your prerogatives, as you understood them? A. Yes, sir.

[1619] Q. And Mr. Carroll did not tell you otherwise? A. I'm sorry, I——

Q. And Mr. Carroll did not tell you otherwise? A. That's true.

Q. Now, sir, after the, if I may call it the Chicago incident, you went down to the main desk of the Edgewater Beach Hotel in Chicago and said "Farewell" in a rather loud voice; is that not correct? A. I don't know how loud my voice was.

Q. Did you not there declare for those who were willing to listen that Sylvania had just made you the

largest Philco dealer in the United States? A. I probably said that, yes.

Q. You were in fact angry? A. Yes, I was very angry.

Q. You left the Philco show—pardon me. Strike that. The Sylvania show in June, went off to Philco, right? A. Yes.

Q. And at that point did you not, sir, there adopt the decision that from henceforth Philco was to be your major line? A. No, sir.

Q. That is not a fact? A. That is not a fact.

Q. Did you not tell Mr. Lopolito that in August? **[1620]** A. No, sir, I don't believe I did.

Q. Did you not tell by Lopolito that in August? when you saw him on the occasion of visiting Keith Anderson's store, Handy-Andy, up in Sacramento? A. No, I did not.

Q. Didn't say "I'm cutting way down"? A. No, I made no such statement.

Q. Didn't tell Mr. Stockman of Philco that down in the Puerto Rico convention? A. No, I did not.

Q. Didn't tell Philco that? A. No, I did not.

Q. Did you not in fact tell Philco, sir, two things, that Sacramento was going to be an exclusive Philco outlet and that Philco was going to be 75 percent of your business henceforth? A. I didn't tell Philco that they were going to be 75 percent of my business henceforth.

Q. Let me show you, sir, Philco Focus, "A Magazine to build Philco dealer sales and profits." You have seen this before, have you not? A. [Examining] Yes.

Q. Can you tell us what that publication is? A. It's a Philco publication.

Q. Put out at or about the time of the—says **[1621]** August '65, after the big show in Puerto Rico? A. Yes.

Q. Now, you are familiar with the statements attributed to you in here, are you not? A. I haven't read this——

Q. For sometime? A. ——for—since it was published.

Q. Let me read that portion to you, sir, appears on Page 18, number on the lower left-hand corner, article by Bob Collin:

> "Continental T.V., Inc., largest retailer of color television in California and one of the leading independents in the country, expects to sell $2 million worth this year, 75 percent Philco. Further, sales projections for the firm, which is headquartered in Santa Clara, show that a $3 million annual volume in color television is definitely within reach in 1966—again with Philco in the the forefront."

Now, attributing a quote to you on Page 19:

> "'We turned to Philco color television after several years with another line,' Shahood said, 'because we think they have the best line of color models in the medium-priced field, where experience has shown 75 percent of our sales **[1622]** are made . . .'"

Pretty good sales stuff, isn't it? A. Yes, it is.

Q. Is that what it was all about, just sales talk? A. Yes, it was.

Q. Just sales talk. A. This is a Philco publication.

Q. I understand that. A. We were negotiating with Philco at the time and we pretty much told them what we thought they wanted to hear.

Q. Okay. One last thing, again attributing comments to you. Mr. Shahood, your reaction to the Philco show:

> "'When he came back from the convention," speaking of Mr. Allen, "he resigned his bank job and joined Continental T.V. as manager of our new Sacramento store which will be an exclusive Philco outlet.'"

Is that again just sales talk? A. No. Originally we planned the Sacramento store for an exclusive Philco outlet.

Q. So that portion of your negotiations with Philco you intended to be seriously taken? A. Yes.

Q. But the 75 percent talk of your business going forward, that was just sales talk? A. I don't remember making that statement, but I may **[1623]** very well have made it in my talk with these Philco people.

Q. Fair enough. I move the admission, Your Honor, of 17.

* * *

The Clerk: Exhibit 17 introduced and admitted in evidence.

[Document marked Defendant's Exhibit 17 for identification was received in evidence.]

* * *

Q. * * * Now, sir, you did tell Philco that you were going to carry a full Philco line in Sacramento, too? A. Yes.

Q. And in fact during the months of July well into August, 1965, it was your plan that Sacramento was to be an exclusive Philco outlet, or maybe Motorola on the side? A. I don't remember the exact date. We had made a management decision at the convention in Puerto Rico to take on Philco as our second major line.

Q. Well, is it not in fact the case that when in July and August you were making arrangements for the new Sacramento store, no thought was given to Sylvania whatsoever for that location? A. That isn't true.

Q. All right. Now, you organized SAM Industries, Inc., **[1624]** a new corporation, right? A. Yes, sir.

Q. That was to operate the Sylvania store in Sacramento? A. It was to operate the television store in Sacramento.

Q. All right. S was Mr. Shahood? A. Yes.

A. A was Allen? A. Yes.

Q. And M was Mr. Miller, Counsel? A. Yes.

Q. And they were the stockholders of this new corporation? A. Yes.

Q. All right, sir. Now, in July and August of 1965 plans were being made to open that Sacramento store, right? A. Yes.

Q. You incorporated, tried to negotiate a lease, and at that time Sylvania people came around with some new instruments for you to sign concerning

their security interest in the Ford merchandise; do you recall that? A. I don't recall it. My signature is in here. A lot of papers went over my desk, and I signed these instruments. These are my signatures.

[1625] Q. All right. Those are Exhibits DM and 12, confirmation of security interests. A. Hm-hmm.

Q. Now, three corporations are listed on those instruments, are they not, Mr. Shahood? A. Yes.

Q. A & G Sales, Continental T.V., Inc. and Sil-Pak. A. Yes.

Q. Now, those are the entities that operate every single one of your stores, Sacramento—pardon me. In San Francisco, Oakland, San Jose, Salinas, everywhere except in Sacramento? A. That's true.

Q. That is a fact, is it not? A. Yes, sir.

Q. So surely in August, sir, of 1965, when you, with the concurrence of your counsel, signed this instrument, you had no intention of having SAM up in Sacramento sell Sylvania? A. Yes, we had an intention. At that time my intention was to sell them via catalog.

Q. Via catalog? A. Yes. I would sell them via catalog, if I could.

Q. But there would be—— **[1625-A]** A. I would turn down no sales if they requested Sylvania. I had no plans at the time for the Continental T.V. store in Sacramento to handle Sylvania.

[Continued on next page; nothing omitted.]

[1626] Q. My question then is: You certainly had no plans to put floored merchandise into Sacramento at that time? A. I wouldn't say that. We

would, if we were going to sell them out of the catalog, we would have had floored merchandise there. But we had—we would have had it in our warehouse and had it available.

Q. Now, with Philco you went through the necessary paper work to set up the flooring for Sacramento well in advance of opening, do you remember that? A. I was never involved in that. Mr. Savage and the Philco credit department handled all that. They would give me the necessary papers to sign and I would sign them. This was true in all cases in our dealings with Sylvania also. They would submit the papers and I would sign them.

Q. Mr. Shahood, if we move from the blowup, if I may call it that, in Chicago, we move through July and August and the incidents you have described with respect to Sacramento, and come to Labor Day 1965. You changed your mind, did you not? A. I changed my mind that weekend.

Q. You decided to work Sylvania merchandise full floored right into Sacramento? A. Yes.

Q. Full line display, the whole works? A. Yes.

[1627] Q. Is it not a fact you did that without more than a couple or three days notice to anybody connected with Sylvania? A. I would say that was true.

Q. And certainly without any prior notice to anybody connected with the Sylvania credit department or with the Maguire floor plan? A. We had never given them—if I can clarify that—when we moved into Sacramento, we never gave them any notice. We never contacted Maguire or Sylvania credit depart-

ment. The same is true for Salinas or Oakland or whatever other location we moved into. Mr. French would know it and he would notify them.

Q. The fact that in July and August you had been asked for the first time to sign new security instruments concerning all your locations, that didn't cause any bells to ring? A. No. The paper work would be forthcoming. I believe that paper work came many months after we opened the store. I expected paper work would be forthcoming.

Q. You mean this defendant's Exhibit 12 and DM came months after you opened Oakland, Salinas and all your stores? That is my point. Did you not realize in that July and August that was—with respect to all your stores special securities were being made, new instruments were **[1628]** being asked for, new concerns being shown? A. No.

Q. It didn't cause any bells to ring? A. No, sir.

Q. I would like to focus on the reasons why you decided on Labor Day weekend to move full line display including floored merchandise into Sacramento. Is it not a fact, sir, that by that date you had decided the elbow room policy was not a meaningful distribution policy in the way Sylvania operated because they did it unilaterally for their own interest? A. I am sorry. I don't understand your question.

Q. Is it not a fact, sir, that you made the decision to move your merchandise into Sacramento because you decided that Sylvania was operating its elbow room unilaterally making all the decisions for themselves and as far as you were concerned it wasn't a real meaningful policy at all? A. No. I felt that

Sylvania was applying their elbow room policy to serve their own self-interests without regard to Continental T.V. in any instance.

Q. That is because they were franchising Young Brothers but against your will? A. That wasn't true.

Q. Let me just read—— A. Let me finish answering that question, if I may. **[1629]** They franchised Young Brothers down the street from my Geary Street store, yet they refused to franchise my store in Sacramento down the street from Handy-Andy.

Q. Yes, Mr. Shahood. But you just told us, sir, that you made the decision to move your merchandise into Sacramento before talking to anybody in Sylvania about that fact. A. We made the decision to display the merchandise. We moved it before. Nobody ever told me that I couldn't move, you know, merchandise to any of my other stores. This was the first instance where they told me that.

Q. Is it not a fact, Mr. Shahood, sir, that the way you conceded [sic] this movement into Sacramento was first retaliation for the Young Brothers decision and more importantly, a last gamut on your part, a gamble if you will, to force Sylvania to reconsider the Young Brothers decision? A. No, it was not.

Q. Let me read to you the following excerpts from your deposition. Page 259, Line 14:

> "Q. At the time you executed this document marked Exhibit B to the complaint, you had already been to the Chicago convention?
>
> "A. Yes.

> "Q. And you had already made some tentative **[1630]** conclusions as to whether or not Syivania had a policy at all called an elbow room policy, did you not? I am talking now about July 15.
>
> "A. Up until July 19——
>
> "Q. '65.
>
> "A. '65? To the best of my knowledge, up until this time they hadn't shipped Young Brothers any merchandise. From what I understand the decision was still in abeyance and I still hoped that they wouldn't ship Young Brothers merchandise. So had they not shipped Young Brothers merchandise and franchised Young Brothers then I certainly would have not put any merchandise in our Sacramento location.
>
> "Q. Are you telling me then that your ultimate decision for moving merchandise into Sacramento was a reprisal for shipping merchandise to Young Brothers?
>
> "A. No, I am not telling you that. It was just in compliance with Sylvania policy as they practiced it. There was no reprisal at all involved."

Let me go to Page 305, sir, Line 12: This is in connection with a conversation allegedly you had in September with Mr. Callahan. I don't think it has any relevancy to my question and answer.

> **[1631]** "Q. Didn't you ask Mr. Callahan about the fact that orders placed in August 1965 had not been shipped?
>
> "A. I think I mentioned that I wasn't receiving any shipments, that they had stopped sending shipments.

"French had told me continuously that, before then—and I related—I believe I related this to him—Lee French had warned me continuously that if I did place merchandise in Sacramento that this would jeopardize my whole relationship with Sylvania. He told me—when you say particular conversations, French was coming in all the time trying to resolve this situation and he repeatedly warned me—he pleaded with me. He said 'This is the greatest program and the greatest policy in the world. He was selling again. He told me 'Look, why jeojardize everything for Sacramento. You don't need Sylvania in Sacramento.'

"At the time I told him—and I recall—I said 'Look, I am not adamant in Sacramento. If in fact this is a policy, they don't put Young Brothers on, I won't put any merchandise in Sacramento. I will adhere to their policy.'

"He said 'Well why should something like that make **[1632]** the difference?'

"He said 'You are going to ruin the whole thing.' He warned me that, also in this interim, if I did put sets in Sacramento that I wouldn't get my shipments of 25's, to keep them out of there until I got that shipment.

"Q. Your store was open in Sacramento already, was it not, sir, September 12th?

"A. September 12th, yes, but this is previous conversations with French prior to the 12th. After August 28th."

Does that refresh your memory, Mr. Shahood?

Mr. Miller: On what, counsel?

Mr. Popofsy: Q. On the question of one of the reasons why you decided to put Sylvania full loored merchandise into Sacramento? A. I have never decided that.

Q. The phrase we discussed in connection with June, this was one gamble, was it not? A. No, it wasn't.

* * *

[1719] * * * Q. Now, Mr. Shahood, after your company received Mr. Lea's—the Maguire Company, Mr. Lea, his letter demanding some $45,000 and notifying you that credit line was formally cut, do you recall that letter? A. Yes.

Q. And after Mr. Allen's reply to that letter, you contacted, as I understand it, Mr. Rudy, your business attorney? A. Yes.

Q. Let me show you Exhibit E-N, which purports to be a letter from Mr. Rudy to Mr. Russell at Sylvania Electric Products, Inc. A. Yes.

Q. Did you know who Mr. Russell was? A. Yes.

Q. Who is Mr. Russell? **[1720]** A. At the time he was the counsel for Sylvania Electric Products in Batavia.

Q. All right, sir. Mr. Rudy says, on September 29:

"Dear Mr. Russell:

"I was not able to reach you by telephone this afternoon after being advised by Continental TV that no one from your office or from you credit department on the Pacific Coast has made any effort to communicate with Continental TV. This continues the program of silence that has been

maintained by your credit people except for the formal notification from John P. Maguire & Company, Inc. that Continental's credit line is reduced to $50,000.

"I hold in my possession the check of Continental TV, Inc., in the sum of $7,631.24 and another check in the sum of $17,495.26, both payable to John P. Maguire & Company, Inc. These checks cover the maturities calculated according to the practice which has been followed in the past and which has been approved by your credit representatives in Los Angeles and in Batavia. The maturities are calculated from the date of delivery of merchandise. The credit arrangement was for 4 months' free flooring with 2 months' extension. Payment was to be made on Friday of [1721] each week with respect to the amounts which matured during the previous week.

"I do not propose to forward these checks to John P. Maguire & Company, Inc., until you have released for shipment the merchandise covered by the present orders of Continental TV, Inc."

Mr. Miller: On Page 2, Mr. Rudy continues:

"Shipment was withheld without any justification or prior notice and after a portion of one order consisting of the undesirable merchandise was shipped. It was only after repeated inquiry by Mr. Shahood as to the failure to ship that he was given the current story that there is a credit problem. No effort has been made to verify Mr. Shahood's financial condition and in truth nothing has been done to indicate that this is, in fact, a credit problem rather than an effort to unfairly curtail Continental's activities in the sale of Sylvania merchandise. The record is quite clear from the statements made by your representatives, both to Mr. Shahood and to third parties, that the credit experience with Continental has been excellent. We can only conclude, therefore, that the present shutdown on Continental is prompted by motives other than the pretended credit problem. I have in my repeated telephone calls to you made a [1722] sincere effort to clear the situation since I am interested not in litigation but in maintaining sensible business relationship. If you choose to ignore our efforts along these lines you leave us no choice but to assert what I know to be Continental's legitimate claims in this matter.

"The losses to the business of Continental are already accumulating in substantial amounts by reason of the inavailability of merchandise to satisfy orders for Sylvania sets. It is obviously necessary that Mr. Shahood alter his advertising program in those instances where it is not already to do so to begin to eliminate reference to the Sylvania product. Obviously some action in one direction or the other is called for.

"If Sylvania persists in its present course it is our calculation that the damages recoverable by Continental will far exceed the balances due on the merchandise heretofore received by Continental and we will withhold payments accordingly.

"A copy of this letter goes to John P. Maguire & Co., Inc., so that they may be fully advised of our position in this situation.

"Except for short periods of absence from my office during the day I will be available to receive your telephone call.

"Yours truly,

"Sidney Rudy."

Mr. Miller: Copy went to John P. Maguire & Company, Continental TV.

Q. Mr. Shahood, did you receive a copy of this letter from your attorney? A. Yes.

Mr. Miller: Your Honor, we would offer this as Claimant's next in order as marked.

Mr. Popofsky: May I have one question on voir dire, Your Honor?

The Court: Yes sir.

Voir Dire Examination

By Mr. Popofsky:

Q. There are certain factual assertions made in Mr. Rudy's letter, Mr. Shahood. Do you know if the source of these factual assertions was you, Continental TV? A. Yes sir.

Mr. Popofsky: Your Honor, Mr. Rudy writes an excellent brief. I have no objection to the admission of this document for the limited purpose of the fact that it was sent. Obviously I object to the admission if it was to be for the purpose of establishing any of the facts set forth therein as **[1724]** in fact facts.

The Court: I assume there wouldn't be any stipulation as to the factual——

Mr. Popofsky: With that assumption, I would——

The Court: ——so it will be admitted.

The Clerk: Exhibit E-N introduced and admitted in evidence.

Mr. Miller: Thank you, Your Honor.

[Letter marked Claimant's Exhibit E-N received in evidence.]

Redirect Examination [Resumed]

By Mr. Miller:

Q. Now, Mr. Shahood, counsel showed you and introduced Exhibit C-D, which is a September 17, 1965 memo from Sylvania to yourself at Continental. Let me refresh you with it, sir, and it says:

"Dear Mr. Shahood:

"The following is a list, by model and serial number of defective and damaged merchandise in your possession. Please return this merchandise, via freight collect, t Sylvania Electric,"

at the address given here, and ends by saying:

"A credit has already been issued to cover the excise tax. Upon its receipt, prompt credit in full, less excise tax will be issued."

[1725] Now, as of September 17, 1965, had your company to your knowledge, received any credits for any of the concealed freight damage which had been claimed month after month on the Maguire audit reports? A. Not to my knowledge.

Q. And the receipt of this letter, of course, was after your conversation with Mr. Lockhart on September 16th? A. Yes.

Q. Sir, was Continental routinely given the money for these credits for this damaged merchandise referred to in Exhibit C-D? A. No sir.

Q. How did Continental obtain credit for this merchandise? A. My attorneys instituted an action in State Court——

Q. All right—— A. ——to recover that money.

Q. Now, Mr. Shahood, you have spoken of the reposession by the Federal Marshals, closing of the stores. How were those stores closed? A. The Federal Marshals came in with trucks, and they picked up all the merchandise which Sylvania and Maguire personnel identified as being floor plan, they loaded them onto the trucks, then they asked myself and my personnel to leave the premises, and then they padlocked the doors.

Testimony of Richard N. Sanford

[1994] * * * Q. All right, sir. Now, did you have any discussions with Mr. Don Carroll prior to the time that your company, Sherman & Clay, entered into a written franchise? A. Yes, sir.

Q. Would you tell us as best you can recall the substance—strike that. First, would you tell us as best you can recall the subjects discussed with him prior to the time you entered **[1995]** into a franchise? A. Well, Mr. Carroll had been soliciting our company as a possible franchise dealer of Sylvania and we had a number of conversations. And in the course of these conversations I examined the line and looked at the merchandise and he disclosed to me their distribution policies.

Q. What did he say about their distribution policies? A. Told me that they were planning, or had a program of limited distribution, that we would have less competition than we would have with some of the other lines that we carried, a little more breathing or elbow room. He also told me that the prices would be maintained and our profits would be protected.

Q. What did you understand him to mean when he said your profits would be protected? A. Well, that we would not be subject to competition who would be cutting our prices.

Q. Now, did he tell you anything on this early occasion respecting whether or not your entire chain would be franchised? A. Well, at the time of the initial discussions we had nine stores carrying radio and television and we discussed each and every one of these locations and I had an understanding with him that he would franchise all of them. However he told me that—excuse me—if we had any additional **[1996]** or new locations we would have to clear them with him in advance.

Q. Now, after you did sign a written franchise and started to handle Sylvania products, did your company in fact open one or more new branches? A. Yes, we purchased a music store in Modesto and placed the Sylvania line there.

Q. Did Mr. Carroll ever discuss with you the Modesto location? A. I'm sure he did. We had the understanding that I was to discuss, advise him of it.

(Continued on the next page; nothing omitted.)

[1997] Q. Did you ever discuss with Mr. Carroll that location? A. I am sure we did.

Q. Did you do so before Sylvania sets were moved for display? A. That was our understanding that we had to do them.

* * *

[2004] * * *Q. Now, what was the situation as you knew it commencing in August of 1965 as it affected retail dealers? A. Well, the supply of merchandise became very critical. We spent more time trying to get merchandise than we did in trying to sell it.

Q. Was this a situation consistent from manufacturer to manufacturer? A. Pretty well, I would say. It would vary to some extent.

Q. Mr. Sanford, did you know at that time if any manufacturer of a major line that was putting on new dealers in the fall of 1965? A. I don't know of any, no, sir.

Q. Now, again to your personal knowledge, how long did this unprecedented demand period for color TV sets continue? A. The shortage continued on through 1966 up until the beginning of 1967.

Q. Now, after, I think you said May of 1966, you left the Sherman and Clay organization? A. Yes.

Q. Did you go to another job in the industry? A. Yes. I joined the national union electric and was attached to their Dupont division as western **[2005]** regional sales manager for Dumont Television and Radio.

Q. Where were you located at that time? A. I headquartered out of San Francisco.

Q. And handled the Dumont product? A. For the 11 western states.

Q. Dumont had the same shortage problem as the other manufacturers? A. Yes, they did.

Q. Now, Mr. Sanford, you have been in this industry a good many years. Can you give us what is generally accepted in the industry as the market area in what is known as the Bay Area market. I would like you to give us this estimate in numbers of people. A. Today?

Q. Today. A. About three million.

Q. Back in 1965 what is your best recollection as to the generally accepted figure as the greater bay area market area in numbers of people? A. Somewhere between two and two and a half million, I would say.

Q. And if I asked you those same questions about the market area of Sacramento in numbers of people today, what is your best estimate? A. I would say that the trading area of Sacramento **[2006]** would be probably around 600,000.

Q. And in 1965 what would be your estimate? A. Somewhere between 500 and 550.

Q. 500,000 and 550,000? A. Somewhere in there.

* * *

Testimony of Robert J. Theis

[2522] * * * "Q. Was there any policy of the sales department against exclusive franchises for an area?

"A. We never pushed exclusive franchises, per se.

"Q. Well, but could the district man give one if he felt it was necessary?

"A. He didn't have the right to give one. Nobody gave an exclusive franchise."

* * *

Testimony of Ray J. Steiner

[2538] * * * The Clerk: State for the Court's records your full name, address and occupation.

The Witness: My name is Ray Steiner. I live in Woodcliff Lake, New Jersey. I am the vice president of the Sony Corporation of America.

The Clerk: Could you spell your last name.

The Witness: S-t-e-i-n-e-r.

[2539] * * * Q. Mr. Steiner, you stated that you were vice president of the Sony Corporation of America. Would you tell us what that is, please. A. The Sony Corporation of America is the subsidiary of the Sony Corporation of Tokyo, and we are the distributing agent for Sony Electric Products in the United States.

Q. How long, sir, have you been in that position? A. I joined Sony in April of 1969.

Q. What was your engagement, sir, prior to April of 1969? A. I was national sales manager of Sylvania in what we call the direct markets.

Q. All right. Just a couple of questions about the change in position. Did your departure from Sylvania and your employment at Sony have anything to do with this litigation? A. None.

Q. Sir, do you have any personal stake or interest in the outcome of this litigation as of this time? A. None.

[2540] Q. Could you briefly trace for us, sir, your business history with Sylvania Electric? A. I joined Sylvania in, I believe, 1960. I was what they call a district sales manager calling on distributors in the Middle West. In 1963 I was brought in as sales manager of their direct markets.

Q. Did that handle retail dealers? A. Yes. Where we sold direct to the retailers.

Q. That was 1963 you told us? A. '63, I believe, yes.

Q. Were you in that position then from 1963 to 1969? A. Yes.

Q. And that would be through the year '65, of course? A. Yes.

Q. All right. Very briefly, prior to joining Sylvania in 1960 what was your business experience? A. I was in the retail business and I also worked for wholesalers in South Bend, Indiana.

Q. Could you briefly tell us your educational background? A. I went to school in South Bend, grade school, **[2541]** high school and attended the university of Notre Dame and graduated from Notre Dame.

Q. Do you have a degree from Notre Dame? A. Yes.

Q. Could you briefly describe for us, sir, your duties as national sales manager direct markets for the period 1963 to April of '69? A. Briefly, I was in charge of a field force of approximately 40 to 45

salesmen and managers. I participated in the making up of quotas by region, by salesmen. We had expense budgets. It was my job to see that we did our sales within the expense budget that we had prepared. I helped in the selection of salesmen and managers. Briefly that is about it.

Q. Do you have any responsibility for the implementation of sales policies? A. Oh, yes, I did.

Q. Were you familiar with the policy known as elbow room? A. Yes.

Q. How long did that policy operate in the Sylvania sales department as far as you are aware? A. It got started when Mr. Bob Theis became president of the company. I would say it started in '62, **[2542]** probably.

Q. How long did it extend through your entire employment? A. Through the time I left Sylvania.

Q. In April of '69? A. Yes.

Q. Was it substantially the same in April of '69 as in '64, '65? A. Yes.

Q. Just for I guess purposes of recapitulation in this trial, could you briefly tell us the chain of command in the Sylvania sales department as it was in 1965. A. Yes. John Morgan was the president of the—let's see—Theis then Morgan and myself and under me were the managers. Whose name is that underneath your finger?

Q. Don Carroll is under your name? A. We had Don Carroll and two other what we call regional sales managers around the country.

Q. Mr. Morgan then was your—— A. Immediate superior.

Q. How many other regional sales managers under you? **[2543]** A. There were two more. A fellow named Lou Garson in the East Coast and a fellow named Carl Esler in the west.

Q. How many district sales managers were there in 1965? A. I would say approximately 40.

Q. Coming directly to elbow room, sir, can you describe for us the history of the origin of elbow room as you understand it? A. Well, basically elbow room was as a result of the fact that as a company we were in trouble. By that I mean that we needed something, a sales pitch that the sales company could use in order for us to get a foot hold in the market. Basically we were competing with RCA, Zenith, Magnavox, Motorola, private brands, and very frankly we were not doing a good job. So the elbow room is basically a selective or limited distribution approach that has been used by other companies in the business, for example, Magnavox, Frigidaire, and we decided we could no longer have a me too approach to the dealers. Because if we were in a me too approach or the same type of approach as RCA or Zenith, basically there was no reason for the dealers to handle our line because **[2544]** they could handle other lines.

Q. To your knowledge, sir, did the sales branch of Sylvania consider any economic alternatives back in 1962, '63? A. Yes. We knew that if the advent of this program, if it didn't work and we didn't increase our market penetration, if we didn't keep our plant running in Batavia, there was the alternative

that we would probably go out of the television business.

Q. Could you then briefly describe for us the concept of elbow room as it was then evolved. A. Well, the way it was evolved is we had distributors who were not doing a good job and we decided in these areas we would go on a direct basis. By that I mean we would not go through distributors, we would sell direct to the dealers. But it went further than that. We had branch operations around the country and we closed up the branch operations because they were very expensive and we were in a, as I said, in a rough position. So we closed up the branches and we had salesmen basically work out of their homes and start approaching and selling the dealers on what we call the one-step basis, from the manufacturer right to the dealer.

Q. You mentioned the phrase selected distribution. **[2545]** What did you mean by that? A. Well, our approach had been previously the same approach as RCA or Zenith in that we tried to sell as much dealers as we could and that had failed for us. So we decided that what we would try to do is have fewer dealers but, let's say, quality dealers and approach the business from that standpoint. We could give a sales story to the prospective dealer about the fact that it was going to be a limited franchise and the franchise would mean something.

Q. As you understood the elbow room policy, what did the franchise mean? A. Well, the franchise basically meant that what we were doing was going across the country was limited distribution, fewer

dealers. We expected the dealers to give us a good display of goods and we expected them to handle the line across the board, black and white, color, stereo, radio, and that basically he would be more or less rolling the dice with us that he could succeed on this type of program with Sylvania.

Q. All right. I would like to show you, if I may, what has been marked as Exhibit 3 and ask you if you recognize that. A. Yes.

[2546] Q. What is that, sir? A. That is our dealer contract, franchise that we had with the dealers.

Q. When to your knowledge, sir, did Sylvania start utilizing a franchise contract of this character? A. With the advent of Mr. Bob Theis and the fact that we went on a direct program around the country.

Q. Was this type of franchise agreement thereafter used? A. Yes.

Q. In connection with all of your distribution system? A. Yes.

Q. Could you describe for us the mechanics of entering into a franchise agreement of this character? A. Basically, what we did was we had to approach the dealers. We told them what our program was going to be around the country, that it was selective distribution, and that we expected certain things of him in the way of display, the fact that he would get behind the line and try to sell it because of the profit opportunity, and the thing that was very important we tied it all up with a franchise that both he signed and we signed and he had a copy. If it worked out, fine, or if not he could terminate the franchise or we could terminate the franchise.

[2547] Q. If I may draw your attention to paragraph 8 of this agreement, sir. It states in part:

> "Dealer agrees to use trade marks or trade names of Sylvania in advertisements, letterheads, or otherwise only as may be approved by Sylvania from time to time in writing."

Then it proceeds on.

What was the Sylvania policy with respect to the use of the Sylvania name in connection with franchise agreements? A. Well, once a dealer was franchised he then had the right to use our name in advertising, promoting the product.

Q. I notice on the front page of Exhibit 3 there is a blank. In this instance it is filled in with the name of Continental TV, Inc. What was Sylvania's policy with respect to the identification of the dealers who would be franchised? A. I don't understand your question.

Q. Well, perhaps I could put it this way: How did your policy operate in connection with the dealers who had more than one store? A. As far as we were concerned, let's say as an example, a silo [sic] in Philadelphia and other people that we dealt with that might have 8 or 10 outlets. We only had **[2548]** one franchise for the account. We did not franchise each and every account with a straight franchise.

Q. Did you franchise each and every location? A. Yes. What we did we had an understanding with them because it was limited that we would have the prerogative of saying that we wanted to be in this branch or that branch and if we agreed to be in a

branch then we had a document in Batavia where we could add to the locations of the dealer.

Q. I would like to ask you just a few questions about the techniques through which the elbow room policy was implemented. What was Sylvania's policy with respect to securing the approval or not of existing dealers in a given area with respect to prospective franchises? A. Oh, on something like that, we never—we couldn't run our business get [sic] approval of dealers to franchise. What we did is that in an area where we had a DSMA and a regional manager, District Sales Manager and a Regional Manager, basically it had to be their decision who they wanted to sell and franchise in their area. And once the decision was made then it was implemented. But we never had to get the approval of the dealer because if we tried to make that approval we would never have any dealers. So by the same token we were looking for **[2549]** different types of distribution. By that I mean maybe in one area you would have an appliance and television store and then maybe you would have a furniture store and you would maybe have a music store. So what we tried to get was a mix of dealers in the area. Then when we decided to franchise something, we did extend the courtesy of going to the dealer and telling him who the new Sylvania dealer was in the area because we thought that was good business.

(Continued on next page.)

[2550] Q. What was the Sylvania policy, sir, with respect to a dealer's handling of other competitive

lines? A. We encouraged them to handle competitive lines.

Q. That's from a sales point of view? A. From a sales point of view. The only thing that would enter into it is that if a dealer got himself spread out across the board with too many lines it could affect them as far as credit was concerned, but from a sales or marketing standpoint we didn't care what lines he handled or how many lines he handled.

Q. What was Sylvania's policy in implementing elbow room as pertains to exclusives? A. We had no exclusives.

Q. All right, sir. Were there any policies in operating elbow room with respect to the categories of customers to whom the dealer was authorized to sell? A. Sell anybody he wanted to.

Q. Were there any policies in connection with elbow room with respect to where a dealer might sell from a franchise location? A. There were no policies restricting where he might sell.

Q. All right, sir. Was there any policy as part of elbow room to procure a promise from dealers with respect to prior approval **[2551]** of opening new branches or movement of goods? A. No.

Q. Was there in fact, to your knowledge, any other agreement entered into in the ordinary course between Sylvania and a dealer beyond the terms of contract—— A. No.

Q. ——number three. What was Sylvania's policy, sir, with respect to pricing? A. We had a suggested list price.

Q. What did you do with that suggested list price, Mr. Steiner? A. Well, our suggested list price was part of our story to the dealer because the way we tried to price our line—you have to understand that in the television business there are what you probably call inflated list prices. Just because an RCA or Zenith is priced at $599.95 that isn't the price it is going to sell at, it will probably sell at closer to 549 or 539. So we realize this. So what we did was to put our suggested list price at that 549 price because we felt at that point it was a good value and then what we did was give a discount to the dealer off of the 549.95 price, which made it a profitable item for him. And therefore he could sell it and make a return on his investment, a generous return on his investment, a legitimate return on his **[2552]** investment.

Q. Were there instances, to your knowledge, where dealers did not follow the suggested price? A. Oh, yes, it went both ways.

Q. You mean above and below? A. Above and below.

Q. What was Sylvania's policy with respect to deviation from suggested list? A. We would try to encourage the dealer to sell at our suggested list to make a profit on the line and it would be of value to the customer, but where we had occasions where the man said, no, even when I sell below your list I am making more than I am making with RCA or Zenith and this is why I want to sell it, fine. We were not fair-traded.

* * *

[2554] * * * Q. All right, sir. Now, you saw the elbow room policy in operation, did you not, during your years with Sylvania? A. Yes.

Q. What was the result of the elbow room policy? A. Well, the result was that it was successful. We did get a foothold in the marketplace and we were able to compete with the big boys in the business and it got the onus off our back that we were going out of business.

* * *

[2584] Q. Mr. John Morgan was the vice president of the home entertainment division, correct? A. That is correct.

Q. And his immediate superior was Mr. Robert Theis, the president? A. That is right.

Q. Now, were there any intermediate supervisors between yourself and the regional sales managers like Mr. Carroll? A. No, I dealt with them directly.

Q. So the chain of command would be from Mr. Theis to Mr. Morgan to yourself to Mr. Carroll here on the coast? A. That is right.

Q. And then, of course, down to the district salesmen? A. That is right.

Q. Now, as I understood your testimony on direct, Mr. Steiner, in 1965, as indeed the policy was at all other times, Sylvania did not give a chain franchises, that is, did not chain their franchises? A. That is right.

Q. In other words, for example, if I were a Sylvania dealer in 1965 in San Jose and your company determined through its representatives that I should

be [2585] allowed to handle the line and I wished to handle your line and I at that time had only one store and you franchised me at that location, my understanding is that your policies dictated that if I subsequently wanted to open a new store in some other market area, be it Sacramento, San Francisco, Monterey, Salinas or whatever, I would have to get the approval of your company prior to the time that I could take Sylvania merchandise and display and sell it in other locations, is that correct? A. No, it is not correct, from one sense. You could take the merchandise to the store but you couldn't—let's say if you took it to Salinas you couldn't be advertising and use the Sylvania name as an authorized Sylvania dealer unless we gave you the permission.

Q. Let's talk about that a minute since you mentioned it. Now, if I have a franchise, for example, in San Jose, as you say, an authorized Sylvania dealer, what does that entitle me to do other than to buy merchandise from your company and display and sell it? A. It entitles you to display and sell it and to use our name in your advertising.

Q. In my advertising? A. Right.

Q. Anything else? [2586] A. It would also entitle you to be a servicing dealer for the line. You could buy parts, tubes, et cetera from Sylvania.

Q. First I could advertise using Sylvania brands, correct? A. Right.

Q. Secondly, I could buy small parts and small tubes or any size tubes? A. Right.

Q. From Sylvania? A. Right.

Q. Anything else, sir? A. That is basically it.

Q. All right. Now, suppose that I am not a franchised Sylvania dealer but I have a friend, let's say, in Chicago who is franchised with your company and I buy from him on a wholesale basis Sylvania sets. I don't deal with your company at all, sir. I bring those sets to San Jose. Can I not advertise Sylvania's brand in my advertisements if I have your merchandise on my floor? A. You could advertise, but you would get no cooperation from Sylvania as far as cooperating in the expense.

Q. In other words, I won't be paid any money by **[2587]** your company to help me advertise? A. Yes.

Q. But under those circumstances I could still buy some small parts from your company if I needed them for Sylvania sets? A. Well, that would be difficult because you were not a Sylvania dealer and you would not have a credit number. The only way you could buy parts would probably be from a local parts jobber on a C.O.D. basis. You wouldn't buy Sylvania because you weren't set up on our books as an account.

Q. So if I was not approved by your company I couldn't do business with your company at least for small parts? A. That would be probably true.

Q. Now, of course, the basic consideration when you talk to dealers throughout the country about—and I mean prospective dealers—about carrying the Sylvania line is—and this is the overriding concern, is it not? They wish to buy quality merchandise at attractive prices and resell it. That is what they are interested in. A. Yes. With any line.

Q. And the Sylvania factory did not furnish technicians who worked in dealers' stores to service sets, did they? **[2588]** A. To actually work in a dealer's store, yes.

Q. Yes? A. No. We had technicians in the territory that if a dealer was having a problem they would visit the store and try to work with a serviceman if he was having a problem on a set.

Q. But all manufacturers to your knowledge have similar service policies? A. Standard policy.

Q. In other words, RCA does this? A. Right.

Q. All right. Now, let's get back to this franchising of the chain. If I understand your testimony, if I am a Sylvania dealer authorized and approved to do business from a location located in San Jose, there is nothing your company could do if I wished to take some of that merchandise and sell it from a store located in San Francisco without your approval, is that correct? A. That is correct.

Q. Are you telling me, sir, that there was no policy in 1965 of your company under which an existing dealer was supposed to get pre-approval of a new location before he moved merchandise there and sold it; is that your testimony? **[2589]** A. Yes, that is my testimony.

Q. Did Mr. Carroll to your knowledge espouse this policy that you have just announced here in 1965? A. I would hope so.

Q. I am sure you have discussed this policy among others, with Mr. Carroll, have you not? A. Yes.

Q. And I am sure that Mr. Carroll has enunciated his thinking on this branch franchising problem to you? A. Yes.

Q. And from these types of discussions it is your personal knowledge that this was also Mr. Carroll's policy in 1965, is that your testimony? A. That is my testimony.

* * *

[2614] * * * Q. Mr. Steiner, during most of the time that you worked for Sylvania it was a subsidiary of a larger **[2615]** parent company, is that correct?

A. That is correct.

Q. General Telephone and Electronics? A. Yes.

Q. Who owns that company, doesn't it? A. Right.

Q. And I kind of got the idea from your direct examination that Sylvania, when you started with that company, was in pretty bad shape financially. Is that what you were saying, Mr. Steiner? A. Not financially, sales-wise and profitability.

Q. You were talking from the salesmen's end of the way the product had been accepted nationally?

A. Yes, our sales were very low.

Q. And when did you start with the company again, sir? A. In 1960, I believe.

Q. Let me show you Exhibit F-C which was obtained from your company during the discovery stages of this litigation and which indicates Sylvania Electric Products' net earnings before taxes for the years 1960 through 1969—the three zeros being omitted on the figures— A. Yes.

Mr. Popofsky: This was produced, Your Honor, at the request of counsel and covered all products sold by Sylvania **[2616]** Electric Products, Inc., not only television.

The Witness: That is what I was going to bring up.

Mr. Miller: I haven't asked any question.

Mr. Popofsky: This witness has not participated in the preparation of this document. It was produced in discovery solely for the purpose of one issue in the case.

Mr. Miller: If this bothers him so much I won't ask any questions about it at all.

Mr. Popofsky: I will stipulate to the accuracy.

Mr. Miller: Q. I just want to ask you if you are familiar with the earnings picture of the corporation as a whole for 1960 through 1965. For instance, pre-tax earnings in 1960 were over $24,000,000. A. Yes.

Q. And they went down in '61 to $8 and one half million and then came back up in '62 to $17,000,000. Were you aware generally, Mr. Steiner, that the pre-tax earnings of Sylvania Electric Products, Inc. more than doubled between the years 1965 and 1966? In other words, from over $40,000,000 in 1965 to over $84,000,000 in 1966. A. No, I can't say that I was familiar with that **[2617]** figure.

Q. In your opinion, sir, at least a substantial amount of that doubling of net profit was attributable to the huge demand for color TV products. A. I imagine we played a part in it, right.

* * *

[2682] "Q. On these occasions you talked to Mr. Shahood about this alleged problem, he in fact told you that there's a certain amount of built-in delay because of his chain store operations, didn't he?

"Yes.

"Q. And you understood that it took several days before the paperwork was processed by Cal Savage through the main inventory system; is that correct?

"A. I don't know what the length of time was.

"Q. But you understood there was some delay?

"A. I would have to assume there is; I don't know what it would be.

"Q. During the first six months of 1965, isn't it a fact that you were having some internal procedural problems in your own departments?

"A. Yes; we discussed that previously, some cash application.

"Q. I am still pointing out that this was during this period of time we are talking about now.

"A. Yes. But we gave special handling to Continental T.V. most of the time because of the large dollar amount, so we were watching it fairly close.

"Q. Was Continental T.V. by this time the largest Sylvania account for Maguire?

"A. I would think it was, yes."

[2761] * * * Q. Can you recall any particular business dealings in which you have participated with Continental TV? A. None whatsoever.

Q. All right, sir. Can you tell us who your predecessor was in your present position? A. Although the title, the structure organization was different, my predecessor was Mr. John Morgan. His title was President Sylvania Sales Corporation.

Q. Do you happen to know where Mr. Morgan is? A. He is associated with Bogan a speaker components manufacturer in New Jersey at the present time.

Q. I would like to ask you first, sir, if you could describe for us your educational background. A. I can do that quite quickly. I was born in Walstam, Massachusetts, June 2. I moved at an early age to Franklin, Ohio. I subsequently attended grammar school, high school in Franklin, Ohio. I attended the University of Notre Dame in 1940. I graduated in 1942. Following World War II with two years [2762] service in the Navy, I returned to Notre Dame for a year's graduate school.

Q. All right, sir. Can you tell us what your first familiarity—Can you first give us your business position following your completion at Notre Dame. A. I joined the Radio Corporation of America in January of 1946.

Q. That is RCA? A. Yes, sir.

Q. As it is generally called? A. Yes, sir.

Q. Could you describe for us your career with RCA. A. Yes. I spent 15 years with the corpora-

tion in a variety of assignments each lasting about 18 months to 2 years with the company. I had various responsibilities in sales, marketing distribution, product. I served as a vice president of their distributing corporation. The last assignment before I left the company to join one of their independent distributors was a five to six year stint as director of color television which was in the period of time that color was a new product being marketed and finally becoming **[2763]** a real product of the America marketplace. At that time I reported to the president of the corporation, John Burns.

Q. All right, sir. You started in 1946. What was the end of your career with RCA? A. Actually in 1961.

Q. All right, sir. By whom were you employed afterwards? A. Following that in Washington D.C. by Southern Wholesalers, Inc., as executive vice president. They are a wholesale entity that handles the RCA line and the Kelvinator line in the Washington-Virginia areas.

Q. What were your responsibilities? A. I had the total responsibility for the wholesale operations as executive vice president in charge of the complete business assignment of running the business and reporting to the president.

Q. That gets us to 1963, does it? A. I believe it does.

Q. By whom were you employed thereafter? A. By the Admiral Corporation in Chicago as sales manager of television products. Perhaps I can help you here. In the business chronology, I spent two

years with Admiral, joined Motorola in Chicago at the end of that **[2764]** two year period.

Q. That is 1965? A. Yes. Then following my assignment with Motorola, I joined Sylvania in December of '67.

Q. What were your responsibilities with Motorola? A. I had both sales and product responsibilities.

Q. So you have been in the television industry since 1947 in one capacity or another? A. Yes, I have.

Q. All right, sir. Do you hold any positions with various trade associations in the industry? A. Yes. I am chairman of the board of the consumer electronics group of the electronic industry association. The title is much more greater than the significance. But it is an honorary position held for a two-year period where as an individual you represent all of the manufacturers of the industry, in particular, legislative affairs in Washington and public relations for the industry in the area of statistics, providing reliable, dependable statistics for the industry, and also in the area of engineering standards. It is a trade association, a federation where the chairman is selected by the member companies to represent **[2765]** them in these various functions.

Q. How long have you held that position? A. I was elected in June of this year.

Q. When do you cease holding that position? A. It will be either June of next year or June of the following year.

Q. During the 23 years that you have been connected with the television industry, have you become familiar with the distribution patterns? A. Yes. I think very precisely, because my background has been—when I refer to the early association, the early years with RCA, my responsibility was opening of the black and white television markets. That simply means that we went into each market as a television station becomes available, set up the distribution structure both wholesale and retail and in effect developed the business in a given market area—so I would think that as well as anyone in the industry I do have a total familiarity with distribution patterns and distribution structure.

Q. Let's go back, if we could, briefly to 1947. Could you tell us what the manufacturing distribution system was at the advent of mass black and white in that year? A. I think so. Immediately following the war—of course, prior **[2766]** to the war there were a variety of manufacturers in our business. It was an easy business to get into inasmuch as the equipment manufacturing facilities were not large or were not expensive—however, after the war with the inception of black and white television, it was such a promising market that we immediately had just innumerable numbers of industries going into the market. Being in RCA was certainly an advantage, because they in effect were the originators of black and white television and had the commanding market share for a period of years. But the evolution was such that within a short span of time, being a highly

competitive business as it is, we had approximately 131 manufacturers producing and marketing television.

Q. Black and white? A. Yes. And these manufacturers employed a variety of means of distribution, of approaches. But basically 85 to 90 percent of the business was channeled through wholesale distributors or the middle man outlets, that of a manufacturer having 90 wholesale outlets spread geographically throughout the United States, and the responsibility of these wholesalers or distributors was to service the retailer in a given area. That service provides, of course, inventorying of merchandise, selling to the retailer, assisting him along the way, financing **[2767]** with him and servicing.

Q. You mentioned there were approximately 131 manufacturers. What happened to them as the years started going by? A. Well, they dropped off one by one. There was some pretty potent individual manufacturers in this group. Of course, as any new industry evolves, there is a great desire to become a part of it, great desire to derive profit from it. There were people like Stromberg Carlson in the business, CBS, Columbia Broadcasting System, and innumerable names such as Dumont that are not participants today. Actually what happened very quickly is that RCA was the dominant factor in 1947, probably had 60, 70 percent of the market. Philco which was a very strong powerful entity in those days came in. Motorola came in. Admiral came in very strongly. During the early fifties you had a changing in leadership

in the industry almost each year. RCA held it for a number of years. And I think in 1950 Philco was number one. Admiral was the following year. This leadership just kept facing [sic] back and forth. As a result of this, there was an intense activity in volume and pricing. As the pricing eroded as a result of volume, many of these other manufacturers, some major **[2768]**, some smaller, just could not sustain themselves in the marketplace. It is probably one of the most competitive industries I think exists.

* * *

[2769] * * * Q. Could you just briefly describe the kind of distribution practice employed by the companies you have described. A. Yes, sir. I would say that most of them who were significant in the business followed the pattern of selling through wholesalers around the country.

In other words, to list the manufacturers that employed that type of sales strategy or merchandise strategy. There was RCA, Zenith, Admiral, Philco, Motorola. These are the significant names in our industry today.

Some of them employed the direct to dealer type of program that Sylvania utilizes for the most part today. I think merging all of this was not a television manufacturer but a company named Magnavox that utilized this type of approach. There were other such as Setchell-Carlson that went to the dealer by passing the wholesaler or middle man.

Q. When, sir, did Magnavox adopt this direct system that you described? A. I believe—I can't

be absolutely specific on **[2770]** the date and I don't know what their pre-war association was or history—but it was there prior to World War II the genesis of this idea or thought. They accelerated it after World War II and they became a growing entity in the business during the fifties, middle fifties and later fifties.

They were concentrating particularly in the area of stereo and of phonograph equipment.

Q. From your perspective, what was Sylvania doing in the market? A. Not very much. Sylvania, as I knew the company being an observer and quite remote from them, in the early days I recall that they got off to a fairly good start as many manufacturers did. This was I believe in '48, '49. Subsequently, they had tried many methods and modes of getting their products to the consumer. But they had product difficulties. They were inherent of a device called halo light which was very simply putting like a neon bulb around the face of the tube. It didn't catch on. They supported this product, I believe, 14 years. During that period of time, I don't believe, and I look back historically as far as I could, they garnered more than a few percent of the industry. They were a struggling factor as were others in an attempt to find a way to bring their name to the public effectively.

[2771] Q. If I can bring you forward, sir, to the years 1961 and 1962. Could you describe the structure of the television industry as it had evolved in those years? A. Right. At that time we were on the prefaces of color television. We were all spending

money to develop a business with very little sales because of the high price of the product. I think you have to put color on the side over here, because at that time RCA was getting 70 to 80 percent of the business that existed.

However, RCA and Zenith, who have been so dominant, and I will have to relate to black and white, I think RCA from an industry share standpoint was number one in black and white with approximately, let's say, and my memory is not that good, let's say they had 18 to 20 percent of the business. Zenith was not far behind with maybe 14 to 15 percent. When you talk of the black and white area, it is a name that we don't mention too frequently in color. But General Electric was a factor.

Then you had a spread of, oh, three or four other manufacturers tht approximated 7 or 8 percent of the market such as Admiral, Motorola, Philco. The pattern at that time is not significantly different than it is today, sir, in our industry as far as number one, two, three, four, five position.

[2772] Q. Where was Sylvania? A. Substantially down the list. If there were 15 manufacturers they were around 13, 14, 12, someplace in there.

(Continued on next page.)

[2773] Q. All right, sir, to your knowledge what type of distribution system had Sylvania been employing? A. Well, they had tried all of them, but they were heavily oriented to the saturation type or the wholesale type that RCA and Zenith endorsed.

They had also experimented with a factory branch type of operation.

In other words, they had difficulty getting experienced wholesalers in the market because after you have such established leaders as RCA, Zenith, General Electric and others, it is difficult to get those wholesalers. So in the late fifties they went to a factory branch type of operation which would be wholly owned subsidiaries as a very expensive approach. This was not successful, and it was in approximately 1961 or '2 that they started moving in the direction of the concept of going direct to the dealer.

Q. You used the phrase "saturation" in describing the wholesaler type of distribution. What did you mean by that, sir? A. Well, to be successful these manufacturers generate as much volume as they possibly can and they are what we call demand lines. They advertise in great depth with great strength. They generate a desire on the part of the consumer to buy their products. To respond to the advertising investment that they have made, they then have to produce the product in great quantities and they have to **[2774]** then have multiple, a great number of dealer outlets to channel the volume that they are talking about to the consumer, and that is my expression of saturation or heavy concentration.

Q. What kind of policy did that form of distribution have with respect to the number of dealers? A. Well, I guess you can say that there is actually no policy regarding the dealers, the number of deal-

ers, I would say it is unlimited. They of course do have, and this is usually established from the manufacturer, but more specifically a local basis with the distributor type of franchise arrangement where the manufacturer wants to make sure—I am sorry, where the local wholesaler wants to make sure the dealer has the, oh, adequate store facilities antenna system to provide good pictures, that he has the service capability, and the things of this type.

Q. Did you at any time become familiar with the marketing or distribution system known as elbow room? A. Yes, I did.

Q. Can you tell us when you became familiar with that? A. I had an awareness. Elbow room to me was a jargon of, you know, the sales department. I did not call it as such. But I became familiar with it quite early in 1950 as we noted the progress of the Magnavox company. They were the first to utilize the elbow room. Elbow room simply means **[2775]** limited distribution. When you don't have the strength to cope with the major manufacturers you have to find a method of distributing your product that will give you a volume level, provide some profitability and grow a business.

Q. Did you become familiar at any time with the fact that Sylvania adopted something like elbow room or elbow room? A. Yes, I did, because I knew a gentleman named Bob Theis who was at Sylvania at the time and he wasn't a close associate of mine, but occasionally we met and at this time Bob told me that Sylvania was adopting a policy of elbow room

or compatible distribution, call it what you may and it was reported in the trade press. I don't have a strong recall of the exact time, but that was around 1962.

Q. When you came to Sylvania, sir, in 1967, what type of distribution philosophy was being employed? A. Well, the same basic philosophy. The concept has not changed, nor will it change. Certainly there are deviations within the plan, but they are minor. The basic concept of distribution exists and it will have to exist for a company such as Sylvania to survive in the competitive market that I am talking about in television.

Q. Today is this still the Sylvania marketing philosophy? A. Yes, it is.

[2776] Q. All right, sir. I would like you to briefly describe for the Court and jury what the purposes of elbow room or limited type of distribution policy is, the purposes are? A. Well, the purpose is really to enable us and our retailers to survive profitably, to effectively compete in a marketplace. Limited distribution merely means that there are less dealers in a given area. We have, for example, perhaps one-sixth of the dealers of our competition, but by having a limited distribution policy we feel that we can develop a more mutually profitable business with the retailer.

If we were to go out and compete with the majors we would not be successful.

What does elbow room do for us? It enables us to develop a close association with the retailer. It en-

ables us hopefully to get the quality, prestige accounts in a given market area. It enables us to, frankly, utilizing the Sylvania name, which is strong in most areas, to get greater representation on that individual dealer's floor, to get a greater share of his business.

The problem in our business today is, and I guess in other businesses, is that with the multiple representation of dealers of products, competitive products, the customer merely goes back and forth between stores and shops maybe eight, ten, twelve stores, and with this elbow room or limited **[2777]** distribution approach he can still shop but he has less area to shop in and we think resultingly our dealers gross a better profit from our line.

Q. What is the technique or the manner by which this limited distribution policy is implemented, what device does Sylvania use? A. Well, we use—I think what you're referring to—what this would be, we have a franchise arrangement and the franchise, we feel, is a strong instrument for us because it does define our mutual relationship and association and what we expect of the dealer and what the dealer expects of us. It's a two-way street and we expect—we expect him, for example, to be well-financed, we expect him to have a store in a high traffic location, we expect him to adequately represent us on his floor, to give us an adequate amount of time for sales training, we expect to work with him in the area of advertising, such as that.

The franchise implementation in our business, we think, is a much stronger vehicle than our competi-

tor's, because of the direct association between factory people that are stationed in local areas as compared to the bridge that the other manufacturers experience to a wholesaler which is separate large business entity in a given market to his people and then to the dealer. I think it is implemented by a very strong franchise and a close relationship with the **[2778]** dealer.

Q. What is the policy under the Sylvania limited distribution plan with respect to locations of franchisees? A. Well, we reserve the right to select the location of a franchise dealer. Maybe it would be helpful if I mentioned at this point, which I haven't referred to, that unlike most of our competitors we establish a volume level for a given market. You have to do this for elbow room policy to be successful. On a national basis, let's say, for example, we want to get five or six percent of the market. Talking about San Francisco or Los Angeles, that's what we want to get and we look at it as we analyze the market from the standpoint of the dealer's capability in franchising the account and specifically we certainly reserve the right to agree, or to select the dealer locations we want to merchandise our product.

Q. Why five or six percent, sir, why not 20 percent? A. Well, we may change our mind some day, but we have tried—let's put it this way, we have tried the 20 percent approach. We tried it very unsuccessfully and I have to relate, of course, I observed this and was not a part of it during that strenuous period from 1948 to 1962, and we just don't have

the capability of competing in volume and advertising monies with RCA and Zenith.

There is a level where we can be profitable and the **[2779]** dealer can be profitable and we have established that based on the costs of our operation, if you will, at a five to six percent level.

Now, admittedly there are areas around the country where we are getting more than that, but as we look at a market we can—if we can get five or six percent of that market we can maintain our limited distribution philosophy, we can be a profitable line for the dealer, we can effectively compete in that market at that level.

Once we start going to more and more dealers we become less important to each of these individual dealers, and there is no magic formula, it is just a point that we have determined that is the level we feel that we can maintain the elbow room philosophy at present.

I think we can probably go to eight percent of the market and maintain this.

Q. As a marketing target? A. As it grows, right.

Q. You said that there were prices [sic] where Sylvania got over five or six percent. Are there places where the reverse is true? A. Yes. You mean where we get less than—unfortunately, yes, there are.

Just to give you a feel of the strength, we are an Eastern originated company. I think when you are in that **[2780]** posture your strongest market share would naturally evolve over a period of years in

the area where you're known best and we have evolved because of other divisions of the company, our lighting division, for example, the Boston, New York, Philadelphia markets, and is a strong entity in those markets. One of our problems, very frankly, and my personal problem, is that we have reached a level of numbers of dealers and volume of business where we cannot franchise many of the accounts that want to be franchised. We have to turn them down, and that is a difficult thing to do for a salesman. But we do have to do it.

On the other hand, our weakest areas have been Chicago and the West Coast. I think there are several reasons. Number one, an Eastern manufacturer, as he grows, grows most slowly on the West Coast. Also in our business, a name that I don't believe exists today, as we were growing, Hoffman was a very successful manufacturer here in California, Packard-Bell was a much more potent factor than they are today from the market share standpoint, and we just have not had the good fortune to grow in these markets the way we would like.

Q. All right, sir, I would like to ask you what importance you attach under a limited distribution policy to the kind of dealer that you attract? A. Well, we think there is a trend in the retail **[2781]** business. I'm sure you have been exposed to the history of our business. We think there is a trend to the retailer handling fewer lines. For obvious reasons. If he handles two or three or four lines of television he can do a better job on those than if he

handles eight or ten. And this gives us an opportunity to better train the dealer for him to better merchandise our line, et cetera, with the limited distribution pattern.

Q. What does the franchise mean to the dealer under the limited distribution philosophy such as Sylvania's? A. I think it is a much stronger franchise than those that exist of a saturation type.

Q. Stronger in what sense? A. Well, stronger because this is the type of arrangement he is looking for with the manufacturer. He wants to have a far greater geographical area to serve, he wants to effectively compete in that area and he can do it better, I feel, with a limited distribution type of an approach than he can in any other way.

Q. All right, sir. I would like to just run through a few of the policies of Sylvania that exist with respect to the limited distribution system.

Mr. Miller: At what time, Counsel?

Mr. Popofsky: As he is familiar with elbow room upon his advent with Sylvania under Sylvania's marketing in **[2782]** 1967 and which, according to the testimony yesterday, remained the same from 1962 through 1969, according to Mr. Steiner.

* * *

[2785] * * * Q. Just generally speaking, can you tell us what has happened to the general level, retail level of color prices in the marketplace? A. Yes, sir. Like black and white, or like any industry, we came in at a very high price level. When I say **[2786]** "we," the industry, and year by year these prices

have eroded, have been reduced due to two elements, I think: They would be increase volume which always helps in the growth of an industry, and secondly, technological changes, development of chassis, reduction of components in the chassis. At the same time it has maintained a severe competitiveness in the business.

It is a difficult business to survive in and I think indicative of that we have lost a few—we have lost Westinghouse last year and I think we are at a juncture in our industry where it is so competitive and so difficult for a manufacturer to make a profit that there may be further erosion.

But to your specific question, the price has receded from a level—I don't recall the exact level in 1961, but let's say it was at the 695 level and at 595, and now you are down and I think you have to talk to comparable merchandise, at least several hundred dollars below that, like 395 to 495.

Q. That is the price to the consumer? A. Yes. That is the suggested retail price. There are a lot lower prices but I was trying to compare a big screen product in that era to one of several hundred dollars reduction.

Q. You mentioned that was true throughout the industry. Was that true of Sylvania as well? **[2787]** A. Yes.

Q. Were you familiar with the supply-demand situation which arose in or about September of 1965 in the television industry? A. Yes, sir.

Q. Can you describe that for us? A. I can remember that pretty well. We of course had been

building a color television set for a number of years with the forecast each year that there would be a shortage evolving.

It really never truly materialized until August, and it was like mid-August of 1965. At that time we had been striving to get the support for the National Broadcasting Company, the first T.V. network in color.

It seems to me about that time both CBS and ABC came in very forcefully into the color picture. The sale of color sets is directly related to the availability of color programming, so in August business started to ascend.

Well, concurrently with this most manufacturers had effectively over-facilitated for the market that existed and they started producing sets as rapidly as they could.

My recall is that that shortage period, that distinct shortage period—and I am speaking from experience at Motorola—was relatively short-lived. It extended into December, perhaps into January of that year.

[2788] I remember then we were attempting to find merchandising methods to move our merchandise during the second quarter.

Q. Of what year? A. Of 1966. It was really the only shortage, distinct shortage period in the history of the color business. It was in August, 1965 to January or February of 1966.

Q. After January-February of 1966, could the television dealers to your knowledge procure new inventory? A. Yes, I would say so because I remember

my own experience and we were attempting to develop plans, merchandising plans to sell what inventories we had. The inventory started building up in pretty good force through that period of that year.

Q. Are you familiar with the term "allocation"? A. Yes.

Q. What does that mean, sir? A. Allocation means that a product is not available in quantities to satisfy the demand of the marketplace. Usually when you are in short supply of a product you put it on allocation and you attempt to allocate it as it becomes available to the customers that have been with you for a period of time, predicated upon their past sales experience.

Q. To your knowledge did Motorola go on allocation? **[2789]** A. No, not as such. We sold to our distributors on a three-month basis and we had allocated—not allocated, but we had provided the distributors the amount of production they were entitled to in June of that year, as we would in every three-month period. As we came into the fall period there were certain models that were not available but we never had an allocation as such. Our total production went to 90 distributors and they in turn sold it to retailers.

[Continued on the next page; nothing omitted.]

[2790] Q. To your knowledge did some manufacturers continue formalities of allocation beyond the January-February period of 1966? A. I think they may have continued the terms because I know that in looking back at the history of our company there was an allocation utilized in that period.

Q. Sylvania? A. Yes. However, with the mass producers I do not recall any need for allocation at that time.

* * *

Q. On the last subject I was discussing with you in connection with the supply-demand situation in 1965, in the last three or four months did that pertain to color TV? A. Yes. There was no shortage—well, in fact, black and white was in abundant supply because the color market was beginning to infringe on the sale of black and white television. As a result the manufacturers had overproduced and black and white inventory was plentiful.

[2802] * * * Q. Is it not a fact, sir, that it follows that where there are fewer dealers handling the Sylvania brand in any market area, it is easier for those dealers to maintain any given level of retail prices on that product? A. That is true. There would be less opportunity for people who come into those stores.

Q. As a result whatever the retail price the dealer sold at he would have less competition from the shoppers. For example, if I was a customer in Sacramento, California and I wanted to buy a Sylvania brand television set, color television set, and the year was 1961, sir, and if you can assume this chart—let me bring it up—you can assume this chart is accurate and there are about 19 dealers shown in 1961 in the Sacramento market area handling the Sylvania brands. Now, if you assume that those facts are true, Mr. Boss, for example, as a typical customer who

wanted to buy a Sylvania brand, I could go to any of those dealers in Sacramento, couldn't I, and shop? A. You could.

Q. And I could shop for price and I could shop **[2803]** for facilities and I could shop for service? A. Yes.

Q. You gave me yes to all those questions? A. Yes.

Q. Now, suppose that the same situation exists as far as the fact that I am hung up on the Sylvania brand and I still wanted a color set from Sylvania but it is now 1966 and I am in Sacramento, sir, and it appears that we have got one dealer named Handy Andy up there in 1966. Now, unless I want to get in my car and drive somewhere else, I have to accept pretty much the prices charged by Handy Andy for Sylvania brands in 1966, don't I? A. That is correct.

Q. And I have to accept his facilities, don't I? A. That is true.

Q. And his service department? A. Yes.

* * *

[2804] * * * Mr. Miller: That is not the fact, Your Honor. I am merely taking Exhibit F-X which incorporates facts in evidence. I am simply asking Mr. Boss if it would not be a fact that the price competition aspect of the SLD distribution policy would be adverse to me in 1966 as a consumer at the retail level in Sacramento.

Q. Do you understand that? A. I understand that.

Q. Could you answer, please? A. No, sir, I couldn't. I would like to qualify it. From the standpoint I think you are leaving out the important element of pricing. That is the element of **[2805]** competitive products in that market. Your assumptions on Sylvania as to your being a consumer coming into the Sacramento and the Handy Andy stores could be basically true. However, I think an altering influence, of course, is the price of the RCA that an account handles or Zenith or a competitive line.

Q. But you would agree if we restrict our discussion as to the same brands, that is, other Sylvania dealers and other Sylvania brands, that the price result to me as a consumer, speaking of that brand alone, would be adverse under that situation? A. As a consumer?

Q. Yes. A. Yes, sir.

Q. Now, as a matter of fact, I have heard Sylvania merchandise referred to as a Cadillac of the industry back in 1965 and 1966. Have you heard the same thing? A. Yes, I have.

Q. And you would agree with me, I take it, that Sylvania products were not considered low price products in 1964 and 1965? A. True.

Q. As a matter of fact, Sylvania built a quality piece of furniture as well as quality electronics? **[2806]** A. They did. A point of addition here, they built the higher priced quality product and they covered the other price categories with a quality product also. They did cover the price spectrum in most all product areas.

Q. All right. But they certainly were not a Muntz brand? A. No, sir.

Q. And they were certainly in your opinion, sir, a higher quality brand than Philco in 1965, were they not? A. I would say so. I would say they had a quality product that time and had sustained it since then, as good a quality as any in the industry.

* * *

Testimony of Lee E. Preston, Jr.

[2872] * * * Q. Mr. Preston, please speak up, if you will. A. Yes, certainly.

Q. What is your present position? A. I am Baker Professor of American Enterprise at the State University of New York at Buffalo.

[2873] Q. What is a Baker Professor? A. Well, it is an endowed chair named after a distinguished industrialist named Melvin H. Baker who was the founder of the National Gypsum Company.

Q. When were you born? A. I was born in 1930 in Dallas, Texas.

* * *

Q. Could you briefly describe for us, Professor, your educational background? A. Yes. I studied economics at Vanderbilt University and received an A.B. Degree in '51. I went from there to Harvard University and received a Master's Degree in '53 and after a period of military service, received a Ph.D. in 1958.

Q. What is your Ph.D. in? A. In economics.

Q. Since your degree was obtained at Harvard University, what positions have you held? A. I came directly from Harvard to Berkeley where I [2874] was an assistant professor in the School of Business Administration and after eleven years on the Berkeley faculty I was eventually a full professor, as time goes by, and an Associate Dean of the School of Business Administration. I resigned that position effective June 30, 1969 to step into my present appointment in Buffalo.

Q. In addition to your professorial duties at Berkeley did you hold any other position in the economic field during the 1960's? A. Yes, on leave from Berkeley I have been with the President's Council of Economic Advisors during the Kennedy Administration and I had the pleasure of meeting Justice Clark during that tenure. I have served as a visiting professor at universities outside the United States and as a consultant to a large number of Government bodies, private firms, law firms, educational publishers and a variety of people in my professional field.

Q. What kind of governmental agencies have you served in an advisory position? A. I was a member of the Neal Task Force, the present task force on antitrust policy under President Johnson and I have been a consultant to the Department of Justice, the United States Federal Trade Commission, the Department of Justice of the State of California and numerous [2875] other agencies.

Q. You mentioned that you served at universities abroad. What ones were they? A. The American

University in Cairo, Egypt in 1966 and the Chinese University of Hong Kong in that year also.

Q. What field of endeavor were you engaged in? A. In teaching and research in the field of economics and marketing. My fields of work through all this activity are economic analyses of marketing and antitrust problems.

Q. Professor, are you a member of any economic societies or professional societies? A. I am a member of the American Economic Association and American Marketing Association.

Q. Have you had occasion to publish in the marketing field? A. Yes, more things probably than you would care to mention or anyone would ever care to read. There are quite a number of books and articles of various types in the field of economics and marketing.

Q. Could you give us a selected list? A. One of the items that might be of special interest in connection with this immediate testimony is an article in the Journal of Law and Contemporary Problems, published by the Duke University Law School. That is an article called [2876] "Exclusive Distribution Arrangements, Economic Analyses and Public Policy Standards." This was an invited article by the editor of the Journal in 1965 for an issue of the Journal devoted to analyses of single firm conduct in this antitrust field in marketing.

Q. Have you had occasion to study distribution methods in different industries? A. Yes, frequently, because I write and teach in this field all the time.

Q. What kind of industries have you published reports concerning? A. Well, quite a number. The food industries, food processing, food manufacturing, food distribution, the paper and pulp industries, petroleum industries, teaching and research in the field of marketing. One regularly follows development in most of the major industries of the country in the field.

Q. Could you give us just a rough estimate of your number of books and articles that you published in the marketing and distribution field? A. I think there are about three dozen, but you can count if I am wrong.

Q. How did you happen to come to testify here today? A. Well, I received a telephone call from Mr. [2877] Popofsky who I believe had learned my name from others in the field and was familiar with some of my written work in the field. He asked if I would look into the types of distribution arrangements that were involved in the Sylvania Company and comment upon their economic effect based on my background in the field in general and a study of the specific activities to whatever extent I was able to find out about them.

Q. Do you recall approximately how long ago you had that conversation? A. Oh, I should know exactly, but it must have been about three months.

Q. Can you tell me what you did following that initial contact? A. Well, based upon general knowledge and knowledge that one has of distribution in, for example, the electric applicance, home appliance

industries. Broadly defined I began to do some background reading about television industry as such, consulting the publications in the business about the number of dealers of various kinds for the types of product. I consulted a Dun & Bradstreet publication which reported in some detail on the number of brands carried by various outlets. [2877-A] I obtained data from very specfic sources relating to the television industry and I talked at length with Mr. Trevision (phonetic) who is present in the room here.

(Continued on the next page; nothing omitted.)

[2878] Mr. Popofsky: Mr. Trevison, would you please stand?

Q. He is with the Sylvania Legal Staff? A. That is correct, with offices at Batavia, New York, and I was able to discuss with him personally and put questions to him which he then answered on the basis of consultation with the other people in the Batavia office in the Sylvania organization, so that I could get some factual background.

Q. Limiting yourself for a moment to the portion of your work which related to a review of the television industry in general, and forgetting Sylvania at the moment— A. All right.

Q. —what did you learn? A. Well, I learned that there are quite a number, I would say about 12 or so, significant domestic brands, manufacturer's brands of television sets. In addition there are quite a number of imported brands. I learned that the market share nationwide of the manufacturers varied quite considerably, that there are perhaps two manu-

facturers who have quite substantial market shares, say 20 percent or so, and then a group of about 8 manufacturers that have market shares ranging from, oh, say 9 to 4, something like that in percentage points.

[2879] Q. Could you identify for us the two with the largest market shares? A. Yes, Zenith and RCA.

Q. Where does Sylvania fall in the industry? A. Sylvania is down near the bottom of the second group, by no means at the bottom of the entire list. But the data I had available showed Sylvania's market share to be in the 4 to 5 percent range.

Q. Did you observe any other facts pertaining to the television industry in general? A. Yes, I looked into the general pattern of distribution in the industry, what kinds of distribution systems the various firms used, the number of outlets that seemed to exist in different areas, the different kinds of outlets. There are so many different kinds of retail firms that handle television sets, such as general appliance stores, department stores, specialized radio stores, discount houses and so forth. I tried to get some notion of the character of distribution practices by various firms in the industry so that I would have a general background on the specific territory that would be important in studying this particular industry.

Q. What types of distribution patterns did you **[2880]** observe, sir? A. Well, I observed that virtually all the significant brands of sets seemed to be represented in all the markets that I could find out

anything about there seems to be large numbers of televisions sets outlets of these different kinds. As I mentioned, many outlets carry several brands of sets and a wide availability of the different branded products and different products with variations offered by each brand.

Q. Did you observe any patterns of distribution policy among the different companies? A. Well, there seemed to be a sharp difference between, let's say, two companies with the largest market shares which follow what I would call a saturation distribution policy. That is a distribution policy aimed at saturating the market with exposure to the brand, a distribution policy aimed at getting what might be described as a maximum number of outlets or at least a very large number of outlets. Other firms in the industry seem to use what I would call a selected distribution policy whereby they apparently choose to have their brand exposed in a selected number of outlets and locations rather than to have their **[2881]** brands present wherever television sets are sold. This is a typical contrast that one observes in many industries.

Q. Could you name some of the other industries?

Mr. Miller: Excuse me, Your Honor. I object at this point on the ground that this testimony is not relevant to the facts and situations that we are confronted with in this case and base my objection on that ground.

Mr. Popofsky: I think we have gone into it already.

The Court: Well, subject to any motions you may make later.

Mr. Miller: Yes, Your Honor. May the record show that it is a continuing objection?

The Court: Yes.

Mr. Popofsky: Q. Professor, my question to you was simply whether you could identify for us other industries which to your knowledge have patterns of distributions similar to those? A. Well, many of the home appliance industries do where some companies want to have their brands available in all possible outlets, and others who have only a few selected outlets in each area. The automobile industry is an example of highly selected distribution—at an extreme of selectivity we might [2882] say. So hard goods in general display a range between high selectivity and the saturation.

Q. I would like to come to the subject at hand and ask you if in connection with your testimony today you were asked to evaluate a set of economic circumstances on the basis of certain accomplishments? A. Yes.

Q. In connection with the testimony you are going to give, would you detail for us the assumptions which you were asked to commence with? A. All right. I believe I can do that readily. One is the fact of a number of brand alternatives in the market in question. We would be discussing a situation in which there were manufacturers and dealers of some type, and a number of manufacturers with different brands, different quality characteristics of the brand, different products within each brand grouping.

A second characteristic that we assume to be of importance here is: does the manufacturer deal directly with the dealers, that they don't deal through some intermediary but deal directly with the retailers, whoever they may be.

A third characteristic is this policy of selectivity that I have just mentioned, that the manufacturers of a [2883] type we are going to be discussing, do try to select individual dealers in specific areas that will carry their products to the consumers in a way the manufacturers think is suitable, and that suitability might be anything but it would certainly include display, advertising, presentation of the product in the place for sale, the location of the outlet itself that is available to people in the market, and that sort of thing.

So selectivity rather than saturation distribution is what that is.

A fourth assumption was that the dealers were selected by location, that there was a notion of a dealer operating at a particular location in a particular geographic area.

A fifth assumption was that the dealers by and large were free to handle any product they chose. That is, they might handle many competitive brands from different manufacturers if they chose to do so, and that the manufacturer of course might select any dealers he chose and that the dealers were in no way restricted in their choice of customers or let's say the out-reach of their advertising or any other device they might choose to make sales from their location, that they could sell anybody they liked.

Q. I have asked you to assume all those facts with reference to a particular manufacturer, have I not? **[2884]** A. Yes, Sylvania.

Q. And I have asked you to assume those facts obtained in Northern California in or about 1965, is that right? A. That is right.

Q. Given that set of assumptions pertaining to distribution practice and given the television industry as you found it in your studies, sir, did you form an opinion on the basis of the industry's characteristics concerning the competitive success of the kinds of distribution practice which you assumed to exist? A. Yes I did.

What is the opinion you have formed? A. Well, my opinion as to the competitive impact of this type of distribution practice and the type of industry we have been discussing can be divided into two levels.

One is with respect to its impact on competition among manufacturers and brands, and one with respect to its impact on competition among outlets and brands in outlets in a specific local market or area.

We might take the second first. Under the assumed circumstances in any local market, and indeed, it is factually true as far as I can see in any local market of any size with respect to television sets, there would tend to be a **[2885]** large number of brands and outlets offering television sets for sale to the general public.

Many of these outlets will offer multiple brands. Some of them may choose to offer only one brand but many brands will be offered through many outlets. Some will be offered only through a few outlets.

In that circumstance the decision of a manufacturer to select one particular outlet or another particular outlet as the outlet distributing his particular brand has no effect on the strength of competition in the market as a whole because there are so many outlets, so many competitive alternatives throughout the market.

Competition in the market doesn't get stronger because the number of brands in outlets, for example, which may be from 99 to 100. That just doesn't have any competitive impact. There is competition if there are 99 and there is competition if there are 100 and the change from 99 to 100 is just not a significant change.

So where you have a situation where we have been assuming here with a number of brands and a large number of outlets, all the outlets offering various combinations of a brand, a change in one or two or even three particular outlets as to whether a carrier couldn't carry a particular brand is just not a very significant competitive matter.

Indeed, I would say it is not a significant competitive matter at all.

[2886] Q. That is to say, if a dealer elects or does not elect to carry any particular line? A. That's right. As long as the brand is represented in the market.

Now, adding or dropping a brand from the market might have a very significant effect depending upon the numbers of brands.

Or any kind of policy, let's say, among all manufacturers, such that no new dealer could come in at all anywhere in the market.

One might wonder how that would come about. But so long as dealers can deal with many manufacturers and many manufacturers deal with many dealers, that is the essence of competition in the distributive sector of the industry and that brings competition to the consumer.

The particular choice of a dealer by a manufacturer is no more an element in determining the strength of the competition than, for example, the consumer's choice of one product over another.

It is the consumer's ability to choose that is competitive. The consumer looks at the various products and has the option of buying whichever one he thinks suits him best.

He makes his choice. Now, whatever his choice is the situation has been competitive as far as he is concerned, [2887] because he has had a very free range of choice among all these alternatives. So it is his freedom to choose among the range of choices available that is the essence of competition, you see, not his particular choice.

The same thing applies to competition at the dealer level when the manufacturer is setting up his dealerships.

Q. You mentioned that there were two levels in which you were going to approach the problem. A. Yes. There is the question of the effect of a particular distribution policy on competition among brands, that is, upon the strength of a brand in the market as in competition with the other brands that are also existing there.

Here I think we have to assume that the executive firms such as Sylvania or any other, try to develop their marketing policies in the way that will make their brand and their firm as strong as possible in the market.

Now, since Sylvania occupies a relatively small position in the television market and it is therefore a competitive element in that market, I think the television market would be less competitive if Sylvania would be out of it, because the number of brands, after all, are 10 to 12.

Sylvania is in there. They are at the bottom, but [2888] in there.

Now, if we squeeze out the bottom firms from that market, then I think we would see a decline in competition among brands in all the major markets in the country. Therefore, if this distribution policy or any particular distribution policy has the effect of strengthening Sylvania or any other smaller firm as a competitive force among the other firms in that market, many of which are much larger, then I think we have to look carefully at that policy as an element in competition, indeed as a pro-competitive policy among the brands and the manufacturers as a whole.

Q. In the opinion which you have just described for us, sir, did you ascertain whether the type of distribution policy that you have assumed to be em-

ployed was in any way beneficial to competition in the sense beyond the one you have just given? A. I think I just responded to that by saying that I think that anything that maintains a range of competitive alternatives throughout the market strengthens competitive forces there.

Q. Does it have any effect from that standpoint on the dealers, this kind of distribution practice? A. I don't want to say no, but the effect really is only on the precise number of dealers and who by name [2889] the dealers are. You see, it is not on whether there are many or few dealers in the total market. That is determined by the fact that there are many manufacturers with different policies. So there are many dealers in the markets with different combinations of brands and products in each dealership. That is what makes the market competitive.

Q. Assuming a distribution practice of the type that you are asked to assume, is there any anti-competitive characteristics that you can identify? A. I don't see any, because I feel that competition in the market has resulted from the large number of brands and dealers available throughout the system. And that any decision about one or two or three in that setting just doesn't affect the level of competition. We think that the competition in the market results from this whole group of people trying to make sales to a group of customers.

Q. Does your analysis of the competitive characteristics of the system relate in any way to the manufacturer's policies with respect to price? A. Not

really. Because if we have effective competition among the brands in the final market, then the prices in the final market, the prices at which people [2890] actually purchase, then are going to be set by competitive forces.

Now, I can adopt any policy I want to with respect to naming prices. For example, on my own books, I can suggest to the publisher that they put $50 price tags on my books. That would be my pricing policy. The publisher, fortunately, is too smart to respond to that suggestion.

But it wouldn't do any good if he did, because, you see, my books would just be out there and nobody would buy them. Why is that true?

Because there is a lot of competition. There are many other authors of books on the same subjects that I write on. Of course, I think mine are very good and the other authors think theirs are very good, and the readers can decide.

The prices have to be set by competition among the various authors of books. So that my attempt to name an outlandish price would be met by my not making a sale. It wouldn't affect the market price at all, which is going to be author-set by my competition. I am just not participating.

So in this competitive structure that we are talking about here, I don't believe that the particular price setting formula practice techniques or whatever of a particular manufacturer really has any impact on what happens [2891] in the market. If you raise his price beyond the price that is acceptable under the competitor he won't make any sale.

That is what competition is.

Q. What if in a particular market area this policy ended up with only one or two dealers carrying a particular brand. Would that produce an anti-competitive effect in any sense? A. I don't see it. The customers in the market still have a wide range of choice. The customers who might buy from that dealer might buy from other dealers other brands or they might look elsewhere in neighboring communities outside the immediate environment to see what brands were available there and what prices were available there and if there is any great difference in prices then they might find it attractive to go to the neighboring community and make a purchase.

* * *

Cross Examination

By Mr. Miller:

Q. And now, Professor Preston, as I understand it, **[2892]** you have just espoused a theoretic analysis for us which bears on the distribution system as you understood Sylvania to use it during certain years, correct? A. Mr. Miller, I have given an analysis that I hope is consistent with the assumptions that Mr. Popofsky outlines, wherever they apply.

Q. And in doing so, Professor Preston, you have also relied on certain, what you would call, I believe, secondary sources of information, correct? A. Yes, that is correct.

Q. These are the statistical surveys which you referred to initially in your testimony? A. I used those to get some basic factual information concern-

ing the kind of economic situation, the kind of marketing situation that was involved in this matter.

Q. Exactly. And you also relied, as you just mentioned, on some factors given you by Mr. Popofsky? A. Some factors given me by Mr. Popofsky. I should say some information given me by Mr. Treviston.

Q. Well, you talked to Mr. Popofsky about this matter, did you not? A. Yes.

Q. And Mr. Treviston is the attorney for the Sylvania Electric Products? **[2893]** A. Yes, sir.

Q. Now, so you got information from Mr. Treviston, the corporation attorney and Mr. Popofsky, the attorney representing the company in this action, and you also relied on certain secondary statistical sources, correct? A. Yes.

Q. And you made what would be called a theoretical analysis, correct? A. Yes sir.

Q. As distinguished from a practical survey? A. Well, sir, I tried to learn enough about the specific situation to see what its general characteristics were, and then work with the general characteristics.

Q. And in doing so, sir, did you make any personal surveys? A. Any personal surveys?

Q. Yes, sir. A. You mean going about in Northern California?

Q. Yes. A. Well, I lived here 11 years, you know, and during this period, the period of the case. I am familiar with the area. I did not make any kind of field studies of the television industry in Northern Calfornia or anywhere else.

Q. All right, sir. **[2894]** Did you make any other what may be termed empirical analysis or study of

the industry in general, the TV industry or the retail structure on the West Coast, particularly in Northern California? A. I don't believe there is anything that hasn't been mentioned. I said I tried to survey all the literature I could find both general and specific. I didn't find too much, but I did make an effort to do that.

Q. All right. Professor Preston, so that we can get this clearly in mind at the outset, has there been anything in the nature of a breakthrough, an economic breakthrough and analysis of these kinds of problems in the last five or six years that you know of? A. Nothing I would describe as a breakthrough, I don't believe.

Q. All right. As I understand your testimony, you talked about the competitive effect of this assumed distribution system on two levels of competition, correct? A. Yes.

Q. On the manufacturing level and on the retail level? A. That is correct.

[2895] Q. You used the term distributors interchangeably in this sense with retailers for purposes of our discussion? A. In my testimony here I probably did. I tend to do that. It is quite clear that we are dealing with only two levels in the market, a manufacturer and his dealers. There are only two levels.

Q. Now, Professor Preston, as I understand your testimony, you said that at the retail level it was your conclusion based upon your theoretical analysis that there was no anti-competitive impact of this particular distribution system, is that a correct statement?

A. The type of policy that we outlined in the assumptions?

Q. Generally speaking. A. Generally speaking, yes, that is my belief.

Q. Now, that conclusion was based, of course, upon your analysis? A. Yes.

Q. And your analysis in turn was based upon certain factual assumptions, correct? A. Certain factual assumptions. Let's just say based on certain assumptions.

Q. And you received some portions of those [2896] assumptions from either Mr. Treviston sitting back there or Mr. Popofsky, did you not? A. I developed the assumptions to reflect what seems to me to be some of the critical aspects of the marketing arrangements in this case, yes.

Q. What I am getting at is didn't Mr. Treviston and Mr. Popofsky tell you something about what you should assume Sylvania distribution policy to be in 1965, for instance? A. They told me something about what they believed it to be. I believed they told me the truth.

Q. What I am asking you is precisely didn't they say, now, in making your analysis, Professor, didn't they say in substance, I want you to assume that the policy was such and so? A. I wouldn't say that that happened really, Mr. Miller. I would say that I asked them what the policy was. They told me to the best of their ability what it was. Then I described that this way in the conversation between ourselves and we came up with a set of descriptive terms that de-

scribed it to us. I think I described it in general. But do not rely on me for the facts about it. I did obtain the facts from them, yes.

Q. Fair enough. **[2897]** So however you want to say this, Professor, you got some facts from the attorneys? A. Yes.

Q. And in making your assumptions and your analysis, in part the assumptions and the analysis were based upon those facts which you obtained from the attorneys, correct? A. Yes.

Q. So if as a matter of fact, some of those assumptions were in error, it could be that your conclusions might be in error to the same extent, correct? A. My conclusion might still be right on assumptions, but the assumptions might not be relevant to the matter at hand.

Q. You are saying the same thing? A. Right.

Q. Now, sir, as I understood your testimony as it related to the retail level of competition, you are saying to us that, as you understood it, the outlet restrictions imposed by Sylvania on its dealer structure, that is, this business of telling a dealer from which location he may resell their product, their brand, that type of restriction had, under your assumption, no connection with resale price maintenance; isn't that true? A. My analysis of the effects of that type of restriction in this type of situation where there are **[2897-A]** multiple manufacturers and multiple dealers is not affected by the particular price policy of any manufacturer.

[Continued on next page. Nothing omitted.]

[2898] Mr. Miller: Q. Now, Prof. Preston, the question was precisely, was your analysis based on the assumption that the Sylvania policy tied a location restriction together with a price maintenance restriction? A. That is not a relevant assumption for my analysis.

Q. I understand your testimony, but I am asking you again to answer the question precisely. Did you understand what I was asking? A. Yes, sir, I do. You asked if I made an assumption about the price policy. The answer is: I don't make any assumption about the price policy because it is not necessary to make any assumption about the price policy.

Q. But I can take your answer as being no, then, that in your analysis you did not consider the effect of a price maintenance program tied to the location restriction program that Sylvania may have used in 1965. A. Mr. Miller, I considered and I did carefully consider whether or not the pricing policy of any one or all manufacturers would affect this analysis, because if it would, then I would have to make specific assumption about the pricing policy. The result of my consideration was and is that if there is a wide range of choice in the final market, we will rely on the competition in the final market to set the limits of prices in the final market and after that it doesn't make any difference how I choose to set my **[2899]** price because no one will buy if I get out of line with my competitors.

Q. Well, I think I am a bit confused, Professor. I was simply trying to find out whether or not in

making these assumptions of fact that you received from the attorneys you included the assumption that there was a price maintenance program tied to the distribution policies of Sylvania. A. I did not include the assumption that there was, nor the assumption that there was not, nor did I include any assumption about the rainfall in Sacramento.

Q. Well, sir, disregarding the rainfall problems, is it not a fact that the price maintenance has a serious anticompetitive impact on the retail level?

Mr. Popofsky: Your Honor, I will have to object to that question. The words "price maintenance" is the most vague of concepts, particularly in a context where the views of what pricing policies may or may not have obtained in 1964 and 1965 is seriously controverted.

The Court: I really think the professor understands this. Do you understand what he means by "price maintenance"?

The Witness: May I ask, Your Honor, if he means specific resale price maintenance under the California Resale Price Maintenance Act, or something like that not under the Act?

Mr. Miller: Q. Let me ask you, since you mentioned **[2900]** that, are you aware that Sylvania fair-trades its products at the present time in California? A. I have been told that, yes.

Q. Did you assume that it so fair-traded its products in 1965 also? A. No, I did not.

Q. You understood to the contrary, didn't you? A. I understood that they had a suggested pricing policy in 1965.

Q. All right. Now, let me sort this out. You said, number one, that you did not assume as one of your "givens" that there was a price maintenance program tied to this location practice called the elbow room, correct? A. Correct.

Q. All right. And would you agree with me that possibly if that in fact was part of Sylvania's policy, and I mean by that, if they did have a price maintenance restriction tied to a location practice restriction, that that type of distribution policy might have different competitive effects than those you theorized about? A. I really don't believe it would.

Q. Well, didn't you write in this Duke Law Review article something about price maintenance, sir? A. Perhaps you better quote or cite it.

Q. Excuse me. At Page 50, I'm reading from "Law **[2901]** and Contemporary Problems," Volume 30, 1965, School of Law, Duke University, and specifically in this volume an article entitled "Restrictive Distribution Arrangements, Economic Analysis and Public Policy Standards," by Lee E. Preston. That is the article you referred to in your direct? A. Yes, that's correct.

Q. Page 520, the second full paragraph, you state, sir:

> "On the contrary, one of the classic motives for resale price control is to insulate the supplier from the forces of price competition among distributors"——

And used in this context, by the way, that would include retailers, correct? A. Oh, yes, definitely.

Q. "——and indeed to enlist them as partners in the pursuit of monopoly profits." A. This says one of the classic, is that the way the sentence begins? "On the contrary one of the classic . . ."

Q. Yes, ". . . one of the classic motives for resale price control." A. One of the classic motives.

Q. Yes. A. Yes. It doesn't say one of the classic effects of resale price maintenance.

Q. All right. But I understand from your testimony, **[2902]** sir, that you did not take into consideration the motive or the purpose for which the distribution policy of Sylvania was installed, is that correct? A. No, I have the impression that the policy of selective distribution was developed in order to assure Sylvania of representation across the markets that they were interested in, trying to make their sales in, and to assure that this representation would be of a character that they thought was most beneficial to making sales as well as possible, that is, in terms of location, display, inventory, the appearance of the retail store, advertising, and so forth. That is my understanding.

Q. Exhibit F, as I understand it, from their operational sales manual, Prof. Preston, says this about the policy as it existed in 1965. You have heard the term "straight line distribution"? A. Yes, I heard it.

Q. To help explain this particular policy. A. Yes.

Q. "S.L.D"—I am quoting from the second page of the Exhibit F:

> "S.L.D. also eliminates same brand competition. Sylvania wants fewer dealers and quality rather than quantity by not over-franchising. Straight line distribution eliminates vicious price-cutting and **[2903]** establishes suggested prices that enables each dealer to make a fair profit and each consumer to receive an outstanding value."

It goes on to say:

> "Elbow room gives every Sylvania dealer a geographic area in which to sell our Sylvania products."

Were you given this information as part of your assumption, sir, in making your theoretical analysis? A. I was, and when I read it I said I thought those were very unfortunate statements, since they were not true.

Q. Now, Prof. Preston, as I understand your testimony, in your analysis it doesn't seem to make any difference whether Sylvania itself decides where dealers ought to be placed or the forces of competition make that decision; is that what you're saying, sir? A. I think that Sylvania is in competition and will try to get dealers in locations which will make it as effectively competitive as it can possible be. If they don't do that, I don't know what they are doing.

Q. Now, let me ask you again, in a given market, not necessarily only the television industry, but in any other given industry where we are concerned about fairly high-priced units, is it not true that the forces of competition at the retail level to a great extent

control the movement of locations and the places where dealers stores are [2904] actually located within major markets? A. I don't mean to be unresponsive, Mr. Miller, I don't quite get the thought. Would you try again?

Q. Let me try again. Is it not a fact that the number and spread of locations of outlets in a given industry, in a given market, are a function of the competition at that level? A. Broadly speaking, yes.

Q. And your analysis, sir, you didn't assume, did you, that part of Sylvania's policies were to respond to a dealer's complaint about another dealer's location and to control location in that manner? A. No, I did not assume that.

Q. You didn't hear anything about that, did you? A. No, not specifically.

Q. So if in fact, Sylvania set up their location or outlet patterns and markets in response to other Sylvania dealer requests or demands, that would certainly change your conclusion somewhat, wouldn't it? A. Oh, yes, it would. It would. However, I would wonder how they got the pattern they have, if that's the case.

Q. All right. As a matter of fact, that would be highly anticompetitive in impact, would it not? A. Well, again, we have to assume what other [2905] characteristics of the market might be, but it would certainly demand a new analysis.

Q. And it certainly could be anticompetitive, could it not? A. It could be.

Q. And certainly your analysis and your conclusion would not necessarily under that set of facts, right? (Sic) A. Not necessarily. We would have to make a new analysis.

Q. Now also did you assume that Sylvania coerced, that is, used coercive means in any way to achieve dealers to locate in any particular way or pattern? A. No, I have no notions about coercion in this analysis.

Q. And if there were, of course, these elements involved in the enforcement of any of these policies that Sylvania had, that in and of itself could alter the conclusions about the competitive impact, could it not?

Mr. Popofsky: Your Honor, I understand the words "coercive element" when someone twists my arm, but I don't know what "coercive element" means in this context. It seems to me this is just a phrase which counsel is using, asking in the abstract about. I do not think it is self-defining. If he means agreements, that's one thing. Object to the question on those grounds.

[2906] The Court: More or less abstract; it is also cross-examination.

Mr. Miller: I didn't mean to confuse you, Professor. Do you understand what I am getting at?

The Witness: Well, I guess we could think about some kind of personal coercion, you know, physical threat, or something like that. I certainly don't have any idea of that sort.

Mr. Miller: Q. Business coercion? A. Business coercion is usually associated with some sort of monopoly power and I don't see that Sylvania has any monopoly power.

Q. All right, sir. A. So the answer to your question is: If there were a situation where there could be a business coercion, you know, all right, a new analysis would be required. I don't see either the assumed or the actual situation in the television manufacturing industry as one involving monopoly power on the part of Sylvania, and therefore I don't understand what its basis for business coercion would be.

Q. All right, sir. If Sylvania practiced coercive techniques to prohibit a dealer in one territory from selling its products in another territory, would you call that business coercion? A. Your quote "if" contains the answer yes.

[2907] Q. And—— A. If it is business coercion, then it is business coercion.

Q. All right, but that is a form of coercion if Sylvania would tell a dealer I am going to cut your credit line, I'm going to sue you, I'm going to lock up your stores, I'm going to do everything I can to put you down the drain if you try to sell your products in another territory, that's business coercion, right? A. All right. All right, yes. All right.

Q. All right. You didn't assume anything like that conduct in making your analyses? A. No.

Q. Now, is it not true that your conclusion would also or may also be changed if you had assumed that any given Sylvania dealer became to rely on Sylvania to a greater extent than one would normally see in

this relationship between dealers and manufacturers in the marketplace, that is, if there are any unusual reliances on behalf of a dealer, this would change the analysis also, would it not? A. If the dealer gave up all other options? Is that your thought?

Q. No. sir. A. The dealer is not able to do anything but carry Sylvania products for some reason?

[2908] [Q.] Let me quote to you from your article here, sir. I am quoting from Page 509, second paragraph.

> "Finally, there is a distinction to be drawn between the balance of competitive forces throughout a broad market and strength or weakness of bargaining positions of particular buyers vis-a-vis particular sellers. For example, when either party to a transaction has come to rely upon the other for more than the normal provision of merchandise and service available elsewhere in the market, the dependent party's bargaining position becomes weakened and the dominant party may attain a power of coercion over this particular trading partner in no way paralleled in its dealings with other enterprises."

Now, you wrote that in your article, you recall that? A. Yes, I do. Yes, and I believe that's true.

Q. You're talking about that kind of a situation that I was trying to describe to you, right? A. You want me to talk about that kind of situation.

Q. I just want you to answer the question, Professor, as to whether or not, first, you took that set of circumstances into account in your analysis in this

case? A. Yes, but read the first of that sentence, if you would, Mr. Miller, because it draws the distinction between the state of competition in a market and particular [2909] bargaining arrangements between particular parties. You see, one of the points there, if I may suggest, one of the points I was trying to make in that particular point in that paper was that particular individuals may have favorable or unfavorable trading relationships in their own personal viewpoint without it having any effect at all on the strength of competition in a market, because there may be many other individuals effectively competing throughout the market, the strength of competition in the market may be very great, but some particular pair of trading parties, one may be at a great disadvantage with respect to other. These are two different matters. And just because it happened that some one trading party was at a disadvantage with respect to some one other trading party, would not imply at all that competition in the market wasn't as strong as it could possibly be.

Q. The question, Professor, was, did you take that set of circumstances into account in making your analysis? A. Maybe the answer is like the price question, the relationship between individual parties do not matter in terms of strength of the competition in the market as a whole. They do not matter. Only if everybody is excluded, you see. Only if everybody is coerced, only if everybody is involved do we have a market wide of that. It's back to whether I buy the blue tie or the red tie, you see. This [2910] competition is in my ability to choose.

Q. Now, Professor, you touched on territorial restrictions. Now, in making your analysis did you assume that Sylvania prevented its dealers from selling its brand outside a certain defined geographic territory? A. I explicitly assumed the contrary, I believe. I explicitly assumed that the dealers were not restricted with respect to their choice of customers.

Q. And that means also that they were not restricted as to the geographic territory in which they were allowed to resell? A. That's correct.

(Continued on the next page; nothing omitted.)

[2911] Q. And if it is a fact that this policy, Sylvania's policy, was to the contrary, that might also change some of your conclusions, right? A. It would change the whole analysis.

Q. As I understand this, one of the effects of this is that—I think you called it—it is a selected distribution system. A. That is the term I would use to describe it.

Q. One of the effects of the selected distribution system is to limit the number of same brands in any given market area. A. I think its effect is to determine the number.

Q. That is, Sylvania in this case would be determining the number that it thought proper in any given market, correct? A. That would be my understanding; the number, the location, what they did.

Q. Right. If Sylvania retained their prerogative in dealing with its dealers? A. That is my understanding.

Q. Let me show you a chart that we have in evidence, which is Exhibit F-X, and for the purpose of

my question I want you to assume the correctness of some of [2912] this information, if you would. It purports to show the Sylvania franchise dealer structure in Sacramento? A. May I say I have never seen this chart before so I will have to take a minute to look carefully at it. I don't know whether the jury has seen it or not. They probably have.

Q. In Sacramento, 1961 to 1967. A. All right.

Q. I might tell you further this information was received from Sylvania in the form of interrogatories under oath and assume for that reason to be accurate.

Mr. Popofsky: We have one adjustment. That is Sherman and Clay in 1965 and '66.

With that adjustment your representation would be sensible to me.

Mr. Miller: All I am saying is that regardless of Sherman and Clay's existence or non-existence as a dealer, this is the information that was given to Continental TV under oath in the interrogatories and for that reason we are making that representation.

Q. I found in 1965 apparently Sherman and Clay, which is not shown on a chart, did in fact carry about $10,000 worth of Sylvania products on the floor in their Sacramento store, but that in 1966 Sherman and Clay [2913] terminated the franchise with Sylvania.

With that type of additional information you can see that in 1961, sir, there were something like 19 dealers which handled the Sylvania brand in Sacramento. Do you know whether or not the elbow room policy of distribution was in effect in 1961? A. My understanding is that it was not.

Q. In 1962 the number of dealers are still about 19. A. I believe that is right.

Q. And do you know whether in 1961 [sic] the elbow room policies were in effect? A. My recollection is that that was the beginning date, but again this is recollection.

Q. In 1963 the market structure for Sylvania dealers dropped. This is one of the selective systems, that it reduces the number of dealers handling that particular brand in a particular market. A. I don't know anything specific about the discontinuation of those dealers handling Sylvania products. I should emphasize that. I don't know in any one individual case or anything general about the whole group of cases about who made the decisions, about who decided to add or [2914] drop. That is a piece of factual information that I just don't know.

Q. The question was: Is it not a fact that the impact of what you call selective distribution systems on any given market is to reduce the number of same brand dealers? A. I have to answer that I do not know. In a market with no dealers I would presume that a selective distribution system would establish fewer new dealers than a saturation distribution system, whether you were to go along and discontinue previous dealers or not. I think it depends on a case by case situation. There are certainly some Sylvania markets where they have a tremendous number of dealers and have had them for a long time.

Q. Let's go to '64 and '65. The number of dealers goes down to three in those years. Substantially all

purchases are being made by only one dealer, Handy Andy, until 1966 where we get to the position where only Handy Andy remains in this particular market. Again isn't that a likely result of this particular selective distribution system, a diminished number of dealers in any particular market area. A. As compared to a saturation system?

Q. Sure. **[2915]** A. Yes, of course that is the essence of it.

Q. And almost by definition then the result is a lessening in the competition between same brand dealers in any given market, is that correct? A. I don't know how competitive they were to begin with.

Q. Does it not follow that if you go from a market that has some 19 competing dealers in the same brand to a market that has two or three, that the competition between those dealers is most likely to be diminished. A. Quite frequently the convenience of purchasers is going to be diminished because they will have to go out to the market instead of being closer. Competition depends on how people behave and also it depends on who else is in the market and where the other dealers are. If there is a great deal of competition between Sylvania dealers and RCA dealers and Zenith dealers, and so forth, then whether you have two, five ten or a hundred Sylvania dealers is not going to matter at all because you are going to have all the competition you can have anyway.

Q. In this article didn't you say that such an arrangement, such customer or territorial restrictions reduces same brand competitions? A. The article

is not about this type of **[2916]** distribution policy at all.

Q. Let me see. You say here on page 507:

"Restrictive marketing arrangements may be adopted both singly and in combination to accomplish particular purposes. Taken individually, the principal types of restrictions and their effects may be summarized as follows:

"1. Customer-territorial restrictions limit distributors in their choice of customers or sales areas. They thus reduce the direct competition between distributors of the same line of product."

A. But we agreed, I think, that the assumptions used in this analysis specifically assume the contrary of that—specifically assume the contrary.

(Continued on next page.)

[2917] Q. Well, Professor, let me ask you that question. If you assumed that Sylvania, as part of their policy, restricted the territories into which a dealer could go with their brand, then the rule would be—the result would be anti-competitive—isn't that right—like you say in your article here? A. If they restricted the dealer's ability to sell to any group of customers, whether these customers are identified geographically or any other way, then we would be going toward the type of analysis presented in this article. You see, the Sylvania system, as we have described it in our assumptions here, wouldn't be termed restrictive in terms of the analysis of this article. If you start back with a definition of restrictive distribution arrangements at the first of the article, this locations clause would not fit.

Q. Professor, what I said and what I asked you to do was to assume not what you were told by Mr. Popofsky and the other gentlemen from Sylvania, but to assume for the purposes of my question, sir, that Sylvania restricted the territories in which Sylvania dealers would resell their brands. I simply asked you if that wasn't the type of anti-competitive impact which you were talking about in this article. **[2918]** A. I definitely was talking in this article about restriction on territories and customers, yes, definitely.

Q. And that impact is anti-competitive. A. It has an anti-competitive dimension. The theme of the article is that it also has a pro-competitive dimension but neither of those dimensions are involved in the assumed circumstances I discussed with Mr. Popofsky.

Q. That is right. You were not asked to assume that factual data, correct? A. Okay, correct.

Q. Did you in making your analysis make any assumption as to whether or not Sylvania's policy included any tie-in arrangements between products whereby, for instance, Sylvania made a dealer purchase so many 21-inch color sets to get so many 25-inch color sets? A. No. I did not have any specific notice about tie-in arrangements. I do have an idea that one of the modes of selective distribution is to deal with dealers who will carry full lines but not because of a tie-in arrangement. That is because they want to carry a full line.

Q. So if Sylvania did require, during some portion of '65 or '66, its dealers to purchase other merchandise in order to get desired merchandise, that could have an anticompetitive effect, could it not? A. I doubt it but I would rather say that I didn't **[2919]** consider anything about tie-in specifically at all.

Q. So you wouldn't want this jury to conclude anything either way, one way or the other, about that subject from what your testimony has been? A. No. For tie-in arrangements to have significant effects on the market there has to be monopoly power. There has to be a monopoly element to which non-monopoly elements are tied. If there is no monopoly element to begin with, then there is nothing to tie anything to.

Q. Referring you again to your article at Page 508 in the first paragraph, don't you say:

> "Product restrictions thus foreclose particular distributors as routes of market access for competitive products and as a result may weaken competition among distributors directly."

A. Yes, and that means limitation in district as to the other products with which they can deal, yes. That is very significant anticompetitive limitation. It is my impression that limitation doesn't arise in the circumstances we are discussing.

Q. You ignored any of those implications because you weren't told about any implications. A. I asked about them and I was told there were none.

[2920] Q. In this article you wrote for the Duke Law Review, do you recall this portion where you talked about serious versus non-serious types of manufacturer restrictions imposed upon dealers? A. Yes.

Q. You said something to the effect that restrictive agreements or policies that don't really alter the behavior of the dealer or dealer's effectiveness were what you would call a non-serious type? A. That is right. I say dismissed from the analysis, trivial restrictive clauses that don't change anybody's behavior.

Q. And then you contrasted those with those policies which in your mind to some degree did affect the behavior of these dealers. A. Yes.

Q. And you go on in the article and you give some examples of these unimportant types of restrictions. Do you remember that? A. Yes, I do.

Q. And you included in that category of unimportant restrictions, things like full line displays. A. Yes.

Q. Minimum stock levels? A. Yes.

[2921] Q. Advertising requirements? A. Yes.

Q. Things like this. A. Yes.

Q. And you also gave some examples of some serious restrictions that did alter the behavior of the dealers, didn't you? A. Yes.

Q. And those included restrictions concerning resale prices, correct? A. Yes.

Q. And they also included restrictions involving retail territories of customers? A. Yes.

Q. Is it not a fact that in markets which you studied—and I assume we are talking about the Northern California market particularly, and in the industries you studied, the T.V. industry—it is a fact, is it not, that the nature and extent of the customers

which a retailer can reach is a function of his location. A. Yes.

Q. And of course the territory in which he is able to make sales reach out is a function of his location or locations. A. Yes.

[2922] Q. And even the nature and extent of the competing firms he must work against is really a function of his location or locations, is that right? A. Yes.

Q. No question about that, is there? A. No real question about that, although the lines are far from hard and fast and there are some customers who are very mobile and other customers who are not mobile at all. So that the out-reach of a firm in a particular location cannot be just drawn off a map as if it were a burning wall.

Q. Are you telling us and do you want this jury to believe it is a minor thing to tell a dealer—a minor thing, that you must have a full line display; to tell a dealer that he can't sell from a location, let's say in Sacramento, and he has to stay in his location in Sacramento [sic] if he wants to handle the brand? Is that what you are telling us? A. No, I don't think it is a minor thing. I don't believe this particular practice that we are referring to was listed either as major or minor in my list, was it? The particular practice, the location practice was not listed one way or the other. I would say it is between the minor, the trivial [2923] that we can dismiss and the major which is a restriction on the persons with whom one can deal.

Q. Like price restriction would be in the serious category. A. I think that real price restrictions, significant price restrictions that cause people to price things other than the prices they would choose are in the significant category. I also think of course that a lot of the superficial resale price policies of many manufacturers is in fact trivial because it doesn't set prices any different than what we have otherwise.

Q. But if I understand your testimony you made no such study of price maintenance as it related to Sylvania's policy? A. No, because it is my belief there is so much competition in the retail sales of television sets that it doesn't make any difference what any one particular firm does with respect to its prices. It can choose not to make any sales by putting the prices too high, but I don't think it can raise prices within the market.

Q. If I was a consumer in Sacramento in 1966 and I really wanted to buy a Sylvania brand—I really wanted a Sylvania set because I had watched the advertising nationally **[2924]** and had seen it on my friend's T.V. set and I was really sold on a Sylvania Home Theatre, I would have to go to Handy-Andy, the sole dealer in Sacramento and pay his price, accept his facilities and service department unless I wanted to go outside the County, wouldn't I? A. Unless you wanted to go outside the County. But before I went to Handy-Andy I looked at the metropolitan paper's ads on Sylvania sets and prices and I might drive over to Woodland or Roseville or Stockton and look at their Sylvania sets and prices

and look at a lot of other people's sets and prices in Sacramento. I certainly wouldn't deal with Handy-Andy if I thought his price wasn't competitive.

(Continued on the next page; nothing omitted.)

[2925] Q. All right. You would get in your car and you could drive down to the Bay Area, too? A. I could pick up a newspaper so easily. I would look at the Chronicle.

Q. You could buy from a newspaper ad. A. No, I could compare the price.

Q. You would have to drive though, would you not, to the store to buy a set? A. If I thought that was my best alternative, yes.

Q. Obviously. Now, did you make a study of how many people in the County of Sacramento read the newspapers from San Francisco? A. No. But having visited often in Sacramento County, I am aware that quite a number of people do.

Q. You don't know how many people in Sacramento read the Oakland Tribune, do you, in any given year? A. No.

Q. You want this jury to believe that a fellow in Sacramento after a hard day's work might come home, be in the market for a television set, get in his car, drive 120 miles on the freeway to a store in San Jose, find a good price on a set, buy it, take it home , have **[2926]** service problems with it and make these kinds of trips, do you think he would really do that?

Mr. Popofsky: I think that question would have to assume that he is dying to have a Sylvania.

The Witness: I don't mind answering that. I don't think he would have to. Because I think if he inquired as to the price of Sylvania sets in Woodland and Roseville and Stockton and Vallejo and looked in the immediate metropolitan paper to see what they were selling for down here or over there or in Fresno perhaps, he might find that indeed the Sylvania prices and indeed the prices for comparable sets of most other manufacturers were very much in line and that the price at Handy-Andy was a competitive price and he wouldn't mind going down there at all to get it.

Mr. Miller: Q. It would certainly be easier for that hypothetical consumer to shop closer to home if he had some choice between Sylvania brand prices, facilities and service departments, wouldn't it? Certainly would be more convenient for him if nothing else? A. It would be more convenient for him to make the price comparison of the brands. Of course, it would be yet more convenient if some government agency, for example, published the prices of all brands in all areas **[2927]** and distributed it everyday. That would be even more convenient. We could do a lot to make this more convenient.

Q. Now, I get the idea from your testimony that it is no real great concern to you if some small television dealer is forced out of the market, let's say, in Sacramento or prohibited entry. I mean, that is of no consequence to competition, if I understand your testimony? A. No consequence of competition. Now, I might not like it at all. It might be of concern to me but not because of its anticompetitive effects.

Q. Well, Professor Preston, do you remember talking about [sic] your article, talking about enterprise competition? A. Yes.

Q. What is [sic] enterprise competition mean in the way you use it? A. Enterprise competition appears in quotation marks there. It always does when I use it, because the term was coined by my friend and colleague, E. T. Grether, at the University of California in Berkeley. Enterprise competition means using all of the dimensions of the firm, whatever they are, to compete with other firms in the market. For example, if I may say so, the use of a selective rather than a saturation distribution policy by a firm like Sylvania is an example of enterprise **[2928]** competition. It is using a distribution policy that seems to make its competitive offering as effective and as attractive as possible in the market in competition with other major manufacturers. So that would be an example.

Q. Now, are you talking about such things as the dealer's personality, the manner he displays products, the kinds of decorations he has in his stores, whether he is aggressive or non-aggressive, these types of things, do they all go into this enterprise? A. Anything. Anything that differentiates or attracts customers, differentiates the firm, that is, or attracts them, might be a dimension of enterprise competition. The contrast is with, let's say, solely focus on price competition or solely focus on advertising competition. The idea is that every activity of the firm may be made a competitive dimension.

* * *

Mr. Miller: Q. Professor Preston, do you recall we were discussing enterprise competition? A. Yes, sir.

Q. And as I understood your previous testimony, [2929] you said in terms of pure competition didn't matter if the little guy was squeezed out at the retail level or was prevented from entering into a particular market, that is, the number of dealers didn't have a real effect, I think you said, on competition. A. The number of dealers provided it is not too small.

Q. Right. So that aside from this monopoly problem, it doesn't really matter if one given dealer is squeezed out of Sacramento, is that your opinion? A. In terms of the strength of competition in Sacramento. No it doesn't matter.

Q. All right. Is it not a fact that in terms of enterprise competition, it might well create more competition, be more competitive if this dealer who was trying to enter Sacramento was highly competitive in this enterprise? A. In some ways.

Q. Let's talk about that a minute. In other words, if you had a dealer who was highly promotional, let's say, in ways that the existing dealers in general were not in a particular market, the entry of that one dealer might well heighten competition, isn't that right? [2930] A. It might, yes.

Q. And conversely, to keep that type of dealer out of the given market might be anti-competitive in effect? I suppose that would follow? A. That would follow.

Q. Now, sir, did you make any study of Continental TV and its affiliated companies as to their sales in any given year? A. I did not make any field study of my own. I did see some data, but I do not recall it at this time.

Q. Did you make any study of Continental TV's display policies? A. The policy that I asked about specifically, of course, was whether Continental tended to be, let's say, a price cutter. At least as to whether Continental tended to be a firm that either cut prices directly or offered something substantially as an added inducement to make sales, I was told that was not the case.

Q. So your answer was no you didn't study Continental's display of policies, correct? A. No. Except that I did not learn anything about them that was distinctive. I asked what its distinctive characteristics were and I didn't learn anything.

Q. And you didn't make any personal studies, sir, of Continental's advertising techniques, did you? [2931] A. No.

Q. Or of Continental's merchandising techniques? A. No. I didn't study Continental in any detail at all.

Q. So you really don't know anything about the competitive effect in Sacramento specifically caused by the entry of Continental TV? A. Mr. Miller, I would not only have had to study Continental but all the other firms operating in Sacramento at that time to see whether Continental was different from other firms in the market or not. I did not do that.

Q. You did not do that? A. I did not do that.

Q. So you can't conclude on the basis of your theoretical analysis that in terms of enterprise competition, keeping Continental out of Sacramento would be neutral or have no effect on competition, can you? A. I do not know for certain that there is not some special mention of competition that Continental might have brought into Sacramento.

Q. So you don't know whether Continental TV utilized a novel or very effective merchandising program or whether it just followed along like a sheep behind the other dealers, do you? A. Not specifically.

[2932] Q. You weren't told that by Mr. Popofsky or this other gentleman? A. I wasn't told anything especially significant about Continental. In this respect, I did inquire but I did not learn anything. At least, I do not recall anything now.

Q. All right, sir. So that your opinion that you gave on direct examination does [sic] Sylvania distribution restrictions did no injury to competition were based on a set of circumstances containing the following facts: The restriction must not be used to maintain suggested resale prices; correct? A. We have been over that several times, Mr. Miller. I can't assume anything about price policies.

Q. And you didn't assume that—let me put it this way: You did assume in making that conclusion that dealers handling Sylvania brands must be located in other areas in such a way as to be able to reach customers in the Sacramento market, correct?

* * *

A. As the suggestion that there are dealers in **[2933]** other communities closer to Sacramento than New York and closer to Sacramento even than San Francisco, someone in Sacramento would look at some other dealers in some other communities if he wanted to look at television sets.

Q. Let me restate it. I am simply saying your analysis was based upon the assumption that other dealers handling Sylvania operated from locations which made it practical for them to reach customers in the Sacramento territory? A. Yes. To communicate to such customers, for customers to be in Sacramento, to know what prices were at other Sylvania outlets.

Q. And it follows then on the basis that the customers in the Sacramento market must have ready access to price information and location information concerning Sylvania brand products? A. Let's say that they could get much information without too much difficulty, yes.

Q. And you assume that these customers in Sacramento would have ready access to these locations where Sylvania brand products were sold, convenient access? A. That they could go there, yes.

Q. And you also assumed nothing, however, about any tying arrangements between products? We have covered that. **[2934]** A. Yes.

Q. You didn't assume that? A. No.

Q. You also assumed that this manufacturer of Sylvania imposed these restrictions itself without imposition from any other dealers? A. Yes.

Q. Of course, we have covered the fact that you assumed that the dealer who was being restricted was not abnormally dependent upon any particular manufacturer, no monopoly power? A. No, no monopoly power in the manufacture, yes, oh, definitely.

Q. Let's talk about that a minute. Did you study the color market from 1965 to 1966? A. Do you mean did I look to see how many manufacturers there were and that sort of thing? The answer to that would be yes.

Q. The question I meant to ask, Professor, was this: Did you study the supply and demand in the color TV market for the years 1965, '66, either nationally or in Northern California? A. Well, I had sales volumes data nationally and in Northern California.

Q. Did you know, sir, specifically that commencing **[2935]** in late August, 1965 an unprecedented demand for color television arrived with vengeance in Northern California? A. An economist wouldn't make that statement, Mr. Miller. We just wouldn't use those terms.

Q. Strike the word vengeance. A. Demand for color television itself increased very, very substantially in total throughout the sixties. Very much so. Nationwide.

Q. Specifically, did you know about that situation starting in August of 1965? A. August of 1965?

Q. It is not meaningful to you? A. It is not a key date.

Q. So as far as you were aware the demand for color television in Northern California simply was on

an increase during the sixties, correct? A. Yes. Of course, not a stable increase, not a regular increase from month to month. There are always lags. The important thing is that the market was growing very rapidly.

Q. I want you to assume for purposes of my next question or two that commencing in September of 1965 and continuing for a period of about 14, 15 months, thereafter, there existed an unprecedented consumer demand at the **[2936]** retail level for color television units of all brands. I want to assume further that precisely at the time of this unprecedented demand all major television manufacturers were caught with under production, they could not meet the demand, and that as a consequence they raised [sic] the number of color sets that they would sell to their existing dealer structure, and in addition they refused to put on new dealers and this was the situation I want you to assume across the board for all manufacturers. A. I assume that. I am not testifying as to accuracy?

Q. That is correct. A. All right.

Q. Given that situation, sir, is it not a fact that a given television manufacturer would in effect assume a certain monopoly power over an existing dealer as to color products? A. No. I don't quite see that. If there is a shortage in the whole market, there is a shortage in the whole market.

Q. All right. Let me ask you this question: Given those assumptions, and for example, assume that I am dealing with you and you are Sylvania and I am an existing Sylvania dealer and you have allocated a cer-

tain number of color [2937] sets to me; correct? A. Right.

Q. And for some reason I am not abiding by some distribution policy you have. Don't you have coercive power particularly in this type of market condition over me in that if I don't abide by your policies I can't get comparable brand, I can't go to other manufacturers and replace a possible loss of your line, don't you have a monopoly power in that connection? A. You are describing a situation where the seller, whoever the seller is, has the greater margins strength with some particular buyer because of these marketwide changes. Yes.

(Continued on next page.)

[2938] Q. Exactly. A. Yes. All right.

Q. That's fairly simple, isn't it? A. Yes.

Q. Straightforward. All right. So isn't that a situation you describe in your article where a dealer could under those assumed facts I gave you, become more than normally dependent to a manufacturer? A. For this period of scarcity?

Q. Yes. A. Of marketwide scarcity.

Q. Yes, sir. A. Yes, but note, if I may note, note that there hasn't been any change in the strength of competition in market price, all dealers have the same experience and you assume a situation where there is scarcity in the whole market, that's why the shift of bargaining power has taken place because of the scarcity in the whole market, so that all the dealers are similarly affected. The competition among the dealers is the same as it ever was. They are all

affected with respect to their relationship to all suppliers.

Q. And you assume also in your conclusion, of course; that the manufacturer does not act coercively as we previously discussed, isn't that right? A. All right, yes.

[2939] Q. And lastly, as we just discussed a moment ago, you have assumed in your conclusion that these restrictions work on a dealer who is not exceptionally promotional, is not highly different, and a dealer using unique techniques, perhaps, you assume that kind of a dealer—strike that. If you assume that kind of a dealer that would change your conclusion as we just discussed in some way, correct? A. Well, perhaps. Could we go back on that a minute?

Q. Well, this is our discussion of enterprise competition. A. Yes, enterprise competition. You see, Mr. Miller, since I lived in Berkeley at this time and I, indeed, was buying television sets at this time and in the end did buy a Sylvania set, as a matter of fact, although I had no notion I would ever be involved in this discussion at the time, I bought it from a dealer in Berkeley. I think I'm aware of what was going on the television market and television competition, certainly throughout the Bay area where at that time Continental was operating and many other firms were operating and I think we observed the high level of competition, although I can't ever recall even hearing the name of Continental as a dealer, for example, while I was a shopper in the Bay area television market. That sort of suggests to me [2940] that

the assumption that most of these firms are a lot alike in their promotional activities is not a stupid one.

Q. Did you ever during that period of time read the T.V. guide? A. Yes.

Q. Did you read the local newspapers? A. Yes.

Q. Did you listen to the radio advertisements? A. Yes.

Q. Did you watch television advertisements? A. Yes.

Q. And you never saw Continental T.V.—— A. I didn't say I never saw it. I'm sure I saw many advertisements and heard many advertisements. My point is that I do not remember the name Continental, which suggests to me that its advertising and promotional activities that I was exposed to was not very different than others.

Q. Do you know how many firms in the television retail business in the Bay area were using home demonstration promotional method of selling? A. No, I do not.

Q. Do you know in fact whether Continental T.V. and its affiliated corporations were using that, Professor? A. I have heard that they did use that at some time in some markets and that's the extent of my knowledge about it.

[2941] Q. Did you study the nature of Handy-Andy, the dealer in Sacramento? A. In any detail, no. I made no field studies in Sacramento.

Q. So you weren't aware of Handy-Andy's size in terms of resales in dollars or units? A. Oh, I have seen sales figures for many of the dealers, both Syl-

vania's figures and the figures that were in that Dun & Bradstreet report.

Q. Did you see them for Handy-Andy? A. Yes.

Q. Did you see them for Continental T.V. and its affiliates? A. I saw figures, yes.

Q. And wouldn't you say that those two firms, Continental and its group of stores on the one hand and Handy-Andy and its two stores in Sacramento on the other hand were comparable in terms of purchases and sales? A. I won't say they weren't comparable. I don't remember the numbers, I am sorry, I just don't. You had some numbers here a moment ago and I would be glad to look at numbers but I don't remember the numbers.

Q. Did you also know or understand that Handy-Andy, that is, the owners, Keith Anderson, was also one of the principal owners of the only Sylvania distributorship in **[2942]** California which sold to eleven counties in Central California? A. Where is that distributorship?

Q. In Fresno. A. In Fresno?

Q. Yes. A. Yes, I believe I did.

Q. Now, the fact that Keith Anderson not only controlled wholesale sales in eleven counties in Central California and also owned and controlled the retail dealer at Sacramento gave him a larger bargaining or a greater bargaining position with the manufacturer of Sylvania than perhaps this dealer up in Woodland who bought some ten or $12,000 of product in 1965; isn't that a fair statement? A. Bargaining position with respect to what, Mr. Miller?

Q. With respect, Professor Preston, to the enforcement, perhaps, of Sylvania's distribution policies. A. Well, he certainly would be an important customer. The reason I asked you with respect to what, Mr. Miller, I wanted to be certain that we are not getting into the price discrimination argument, which I presume we are not.

Q. Now, did you tell me, sir, you did not personally run a field study in Sacramento? A. I did not. I did tell you that I did not do it.

[2943] Q. All right. You did prepare some data which you attached in three or four tables to your prepared testimony, correct? A. Yes, to the notes concerning the testimony that I gave to Mr. Foster.

Q. Yes. Do you have a copy? A. I don't have it with me, but I believe there is one there on the table.

Q. Thank you. Would you turn to the table marked Table 3. See that, sir? A. Yes, I do.

Q. Now, what you have done here is listed, what do you have, ten or twelve cities in the United States? A. There are twelve of what are called standard metropolitan statistical areas. These are really county groups, they are groups of counties.

Q. And you listed Sacramento, California, among them? A. Yes.

Q. And then you show the number of color T.V. sales outlets for 1966, right? A. As given in the Dun & Bradstreet report which we believe to be an underestimate of the numbers.

Q. You show 49 outlets in Sacramento. A. Yes, that's correct.

[2944] Q. And this means, does it not, that 49 outlets carrying a variety of brands. A. One or many.

Q. You made no study to find out how many brands were carried? A. Oh, yes, the Dun & Bradstreet report shows that, Mr. Miller, but the comparison of Dun & Bradstreet data with the Sylvania, Sylvania's own data, showed that the Dun & Bradstreet data left out a lot of dealers and therefore I concluded that it didn't provide a good enough description to be more than indicative and that we couldn't really trust it for the number, frankly. In fact, there were about 120 what I call brand outlet exposures. That means brands exposed in an outlet. So the same brand in two outlets would count for two or one outlet with two brands would count for two; counting either way, there were 120 or so brand outlet exposures listed in the Dun & Bradstreet report.

Q. Well, Professor, there is no way that I can tell from looking at this table to see how many brands were carried at any of these outlets, is there? A. Not from this table, no.

Q. But you show some 49 outlets in Sacramento, California, in 1966, correct? A. That's correct.

[2945] Q. And then you show a number of Sylvania dealers, 1965, and you say there are five dealers in 1965. Where did you get that information? A. From someone in Mr. Traviston's office.

Q. Mr. Traviston gave you that? A. Yes, he did.

Q. Getting back to our chart, Exhibit FX, 1965, according again to interrogatories given to us under oath from Sylvania, shows Handy-Andy who pur-

chased almost a million dollars of product from Sylvania, the second dealer, J. W. Brewer, purchased $11,290 worth of product that year. The footnote on Brewer says, "Brewer purchased only one color T.V. set in 1965 and all purchases were sold outside of the City of Sacramento." The other dealer in 1965, according to the interrogatories under oath, was Tri-State Sales. Now, Tri-State purchased $327 worth of product for the year and the footnote 4 says, Tri-State purchased no color T.V. sets in 1965. Now, with the possible exception of Sherman and Clay, it appears that only Handy-Andy had color sets in Sacramento in 1965. Were you aware of that, sir? A. You mean sold color sets? I don't know what they had, do you?

Q. Well, more precisely, purchased color sets from Sylvania. **[2946]** A. Are these purchases or sales?

Q. These are purchases. A. Purchases by the dealers. All right. Then it's Handy-Andy and possibly Sherman-Clay, right.

Q. Right. So there aren't five, really two. A. No, they are two different things. We could have two different columns. The question I asked Mr. Treviston and his staff and the answer I got was the number of franchise dealers, outlets, franchise dealer outlets.

Q. All right. A. And they provided me with the number five.

Q. Who are they? A. Well, you have just shown three, apparently and the other one, there's one more than Sherman-Clay and I don't have the fifth name. I had a list of names, but I don't have it here.

Q. Let's look at this again. Now, the question was, did you realize that the second dealer, Brewer, purchased only one color set in 1965 and he didn't even sell it within the territory? A. No. No, I didn't know anything about it.

Q. Did you know that Tri-State Sales did not purchase one color set in 1965? A. No.

[2947] Q. And did you know that Handy-Andy purchased literally hundreds of color T.V. sets and spent almost a million dollars with the company, compared to the next largest dealer which was perhaps Sherman and Clay who had about $10,000 worth of product on the floor? Did you know those things? A. I knew that Handy-Andy was by far the largest dealer, yes.

Q. Did you know the actual sales or purchase figures? A. I saw them, but, you see, the specific number doesn't hit me too hard.

Q. Didn't make too much difference? A. No, but it was by far the largest dealer, I know that.

Q. Now, if you look at the bottom where we add up these columns on Table 3, of these twelve locations you have picked, it appears that there is a total of 652 television outlets in these various cities across the country, including Sacramento, right? A. According to the Dun & Bradstreet report.

Q. If you totalled up the total number of Sylvania dealers in each of those cities you get a hundred and eighty-two out of 652 outlets, correct? A. That is correct.

[2948] Q. Now, if my mathematics are correct, that is 27 percent. A. Yes.

Q. All right. So it is fair to say that in this study group of cities, whether or not that is truly representative, but in this study, 27 percent of the total outlets investigated carried the Sylvania brand; correct? A. Well, not really correct, Mr. Miller. I wish it were correct. It isn't your mistake and it isn't my mistake, it is that the two numbers come from two different sources and column three, the Dun & Bradstreet data is too small a number. We know that because we know that there are Sylvania dealers not enumerated in this Dun & Bradstreet report. We found that out by checking. If we presume there are other dealers not enumerated in the Dun & Bradstreet report, then we know that 652 is not the actual total number of T.V. set outlets in those cities.

Q. All right, disregarding that, based upon the figures shown in your table three, we are talking about 27 percent, aren't we? A. I won't talk about 27 percent, Mr. Miller, but I can tell you what the percentage is I would talk about.

Q. Well, just a moment, sir. I get 27 percent based upon the total number of Sylvania dealers and the total number of outlets in these selected cities. Would you **[2949]** agree with that or not? A. Your arithmetic is all right, but the comparison is not relevant. May I tell you what the comparative number is? We don't have to think it is right or not, but we do happen to know the number that would be the right, the appropriate one to use in this comparison.

Q. Are you through? A. Excuse me.

Q. Now, Professor, you have listed a number of cities here. We have Tampa, Florida, 46 outlets and

five Sylvania dealers. That means to me about 10 percent of the dealers in Tampa carry the brand. In Rochester you show about 25 percent of the dealers carrying Sylvania. In Columbus it works out to be about 17 percent. In Phoenix it is about 49 percent. In Providence it is about 57 percent of the dealer outlets carry the brand. In Dayton it is only 5 percent and in Louisville it is 19 percent. Hartford 17 percent, Ft. Worth 8 percent, Memphis 26 percent. Finally we get to Albany, 87 percent of the outlets studied in Albany carries Sylvania's brand. Now, in 1966, sir, did you know that there was only one dealer left in Sacramento? Not five, not four, but one? A. I will say it was either one or two, depending on whether Sherman and Clay discontinued, and I am not sure **[2950]** what the answer is.

Q. All right. Assuming, sir, for the purpose of this question, that there was indeed only one, would you work out for me the percentage of outlets that carried Sylvania's brand in Sacramento in 1966? A. If we assume there were 49 outlets?

Q. Yes, sir. A. It would be 2 percent.

Q. 2 percent, less than half of the lowest of all these test cities which was Dayton at 5 percent, correct? A. Mr. Miller, I am sorry——

Q. I am just asking you—— A. The numbers are just really not correct, you know. I really wish they were, but they are not. The numbers you are using are not correct.

Q. These numbers, sir, are coming from your table three, are they not, attached to your testimony?

A. But one cannot be correctly expressed as a percentage of the other, Mr. Miller.

Q. Are your numbers correct? A. They are correct in each column for what it says it is.

Q. Are you telling me that it is not correct to express the number of Sylvania dealers as a percent of the total outlets? **[2951]** A. Not from those two columns it is not correct to do so; that's why I didn't do it.

Q. Why is that, Professor? A. Because if you look at Page 17, Mr. Miller, you have the explanation here. The Dun & Bradstreet report—I am reading from my own report—shows Sylvania represented in eleven percent of all the surveyed dealerships in the 100 largest metropolitan areas. You see the comparison here in this sentence I just read, the 11 percent, is the nationwide average that is an appropriate figure if we want to make the percentage based upon the Dun & Bradstreet report, because that's taking the Sylvania representation in the Dun & Bradstreet report and the total representation in the Dun & Bradstreet report.

Q. All right, so we have 11 percent nationally, right? A. In the Dun & Bradstreet report.

Q. All right. That means on a national basis 11 percent of the outlets carried the Sylvania brand, correct? A. Yes.

Q. And yet in 1966 in Sylvania products, only 2 percent carried it in Sacramento, right? A. Yes, something like that.

Q. One or two out of 49. A. Yes.

[2952] Q. Now, if another dealer had been permitted to enter Sacramento in 1966 and assuming for this question that there was only one existing dealer up there at that time, that would have merely doubled Sylvania's penetration as a percentage of outlets carrying the brand; correct? A. Yes, that's correct.

Q. Would have gone from two to about four percent, correct? A. Yes, if it went from one to two on the basis of fifty.

Q. Compared to a national average of 11 percent, right? A. Yes, sir.

(Continued on the next page; nothing omitted.)

[2953] Q. Why did you use 1966 data for the number of total TV outlets and 1965 data for the number of Sylvania outlets? A. I used a 1966 data because that was the only year that Dun and Bradstreet's report covers. It is a single year report and that is the only year for which it is available. I use 1965 data for the Sylvania dealers because that was the year in which the matter under litigation arose and because the two sets of numbers are not directly comparable and I want to emphasize that.

Q. Professor, you also talked about competition at the manufacturing level, did you not, in your direct examination? A. Yes, sir.

Q. And I think you were giving us the idea that it was somehow necessary for Sylvania to use this restrictive distribution policy. Generally that is a fair statement of what you said? A. I presume that the executives of Sylvania thought it was a good idea or they wouldn't have done it, yes, sir.

Q. And further you kind of gave the idea that if Sylvania did not adopt this policy of distribution, that [2954] it would somehow affect Sylvania's ability to compete with its fellow manufacturers; isn't that what you were saying? A. Yes, I think that is a fair assumption since I suppose that is what the executives thought.

Q. And you said, I think, that Sylvania had about a four to five percent share of the market nationally? A. Yes.

Q. And you seemed to say that you thought for some reason that this restrictive policy that they had enabled them to maintain that share? A. I don't use the word "restricted" with respect to the policy. But I think the policy of distribution that they were promoting did serve to strengthen their competitive position nationwide.

Q. You are not trying to tell this jury, are you, Professor, that you thought that Sylvania was a very weak company, a company which was failing? A. No, certainly not.

Q. Certainly you didn't mean to give that impression, did you? A. Certainly not.

Q. You know that it is strong financially and was strong financially in 1965? A. I presume that is the case.

[2955] Q. And you didn't assume anything to the contrary, did you? A. No, sir.

Q. There could be other reasons, couldn't there, that Sylvania was able to maintain a 4 to 5 percent share of the market nationally besides the use of this

particular distribution policy? A. Oh, many other reasons, of course.

Q. In other words, quality of the product? A. Of course.

Q. That could be a reason. A. Yes.

Q. Promotion? A. Yes.

Q. Advertising? A. Yes.

Q. They may just have a better product than some of their competitors. A. Judging by the market share this is not widely enough known. You didn't hear apparently that Sylvania is the Cadillac of the industry. Well, I bought one, as I told you before I ever had any connection with the firm and I am quite satisfied.

Q. So you are not saying that it necessarily [2956] follows that these particular distributions policies were or are necessary in order that Sylvania be able to maintain its present market share, are you? A. No, I certainly am not.

Q. There is no way to tell, is there? A. I suppose given enough imagination and spending enough money we might conduct some kind of research to satisfy ourselves on it, but I don't think we would be able to.

Q. You certainly didn't attempt anything like that. A. I did not. I do think that every firm responsible to its own competitive situation has to be considered as its best attempt at enterprise competition, as we were discussing earlier, and that we are hasty to say that relatively well planned, sensible firms obviously in a competitive position with others in the market

do bizarre things without reasons. I think we should rather think that their behavior is motivated toward improving their competitive position and we can look at the data and see whether it does.

Q. There is really no way you can tell from the competitive effect at a retail level—you can't tell from that type of information what the competitive effect at the [2957] manufacturing level is going to be, can you? A. They are not the same thing. I agree with that, that they are not the same.

Q. And there doesn't seem any direct correlation between the two? A. Of course, if a firm, as I say, was pricing its product way out of competitive limits at the retail level, then it would show a decline in marketing shares at the manufacturing level.

Q. Didn't you say in this article, starting at page 508 in Duke Law Review:

> "A closely related matter is the interaction between horizontal and vertical market relationships. The present state of economic analysis doesn't in general permit us to specify the impact of changes of one of several vertically related market levels upon structure and behavior at another."

A. Yes, you are quoting from my own writing.

Q. Right, and that was true at the time you wrote this article? A. Yes.

Q. And it is still true? A. I have been working on that since then and have written more about it. I think I have a few more ideas but they don't answer the questions yet.

[2958] Q. Basically that is still true? A. Yes, I think that is right.

Q. Lastly, Professor, it seemed to me that you were telling all of us that in terms of competition it didn't really matter if you squeezed out the little retail dealer in Sacramento because the number of dealers doesn't really correlate directly to competition at that level, but that you can't squeeze out a manufacturer because if you squeeze out a manufacturer that is anti-competitive. Is that what you were trying to tell us? A. It is not a question of whether it is a dealer or manfacturer. The change from 100 manufacturers to 99 manufacturers in an area doesn't change the competition either. It is a question of numbers.

Q. How about the change from two Sylvania dealers in a given market area to one? A. It depends on whether you think there is a market for television sets or a market for Sylvania television sets. If there is a market for television sets with 50 dealers in it, which is the way we have been describing this market, a change of one, you really would have to make some very special assumptions to get any kind of result that a change of one was going to alter competitive conditions or price levels or volume, or anything else in the market.

[2959] Q. Do you recall the assumptions I asked you to make about the unprecedented demand for color products in 1965 and '66? A. Yes, Mr. Miller.

Q. I wish you would make those assumptions for the purpose of this question and let me ask you where there is a shortage of color television sets obtainable

by retail dealers, such as I have asked you to assume, would not that mean that there would also be a shortage of choices at the consumer level between prices, for instance? A. Not necessarily a shortage of choices. I would expect all prices to go up.

Q. And would it not follow that if an additional dealer entered with additional products under marketing conditions such as those, that this would increase the competition pricewise? A. Not necessarily, Mr. Miller. We could have a lot of competition but it is based on scarcity and higher cost and higher prices and we could still have a lot of competition.

Q. If you add product by adding another dealer in a market period of scarcity of products, are you telling us that you want this jury to believe there would be no change in the competitive impact at the retail level? [2960] A. Mr. Miller, to argue that you have to argue that there has been a decline in competition in the market from which the man took the sets, and I do not believe that.

Q. So your answer is no, sir, it would make no difference to competition. A. My answer is no, sir in the quantities that we are talking about. We haven't mentioned any quantity, but if we are talking about doubling the market quantity, maybe yes. But then that means emptying the market quantity somewhere else. That means emptying another market. This situation that we assumed in terms of scarcity and increasing demand was market-wide, nationwide, so if there is a scarcity all over the country and we shift sets from one place to another and if the market

in the various areas were equally competitive to begin with, if there is any proper competitive market where the product goes, then there must be an anti-competitive effect where the product left. If we are talking about 1 percent, 2 percent, 3 percent of the quantity sold in various market areas, I just find that preposterous.

Q. In 1965 how many color units would you find to have been sold in Sacramento, for instance? A. Do I have that data here? Excuse me. If I have it I will know. [2961] Estimated color television sales in 1965, total units—this is all brands—16,788.

Q. Look to Table 3, please. A. I am sorry, this is Table 3, Column 5.

Q. You show that Sylvania's estimated share in Sacramento was 12.6 percent of the market? A. Yes.

Q. And do you show the total number of units sold in Sacramento? A. Not by Sylvania.

Q. Total number of brands? A. 16,000.

Q. Take 12.6 percent of that figure and that would give you in units the number of Sylvania units sold in that market, right? A. Yes, I think so.

Q. My mathematics show about 2,112. A. That would be about right.

Q. Getting back to your discussion about the impact of bringing new products in during that unprecedented shortage period, the dealer was able to enter a market with 2,000 sets for that year. That is doubling the product available to the consumer. Wouldn't that have an impact on competition pricewise? [2962] A. Well, would it?

Q. I am asking you, sir. A. If he came in at a lower price I think it would. If he came in at the same price then it wouldn't.

Q. Would not other dealers have some pressure to compete with that new dealer with volumes of product? A. They might, although we must relate the 2,000 that you assume coming into the market to what you might call 17,000 sets in the total market, not just Sylvania sets.

Q. Didn't you say in fact a market is not competitive when the range of choice is unnecessarily narrow or whether their ability to shift among sellers is restrained by artificial barriers? A. Yes.

Q. And wouldn't you say that there would be some effect in the context of what you are saying in that statement, some effect where there is an unprecedented shortage of product. A. Some effect, on what, Mr. Miller?

Q. On the customer's ability to make choices. A. Well, all the brands are already there. We haven't added a new brand, have we? The brand was already there. This 2,000 is not 2,000 of a new brand. It is 2,000 **[2963]** of a brand that is already in the market.

Q. Yes. A. The guess is whether the 2,000 additional sets are brought in at a price lower than the price that was prevailing in the market before. In this period of intense demand and shortage that you have described, I would be very surprised if anybody brought in the additional sets and cut the price.

Q. In 1966 in Sacramento what pressure was there on Handy-Andy to sell at a low price? A. The pressure of the other 48 outlets.

Q. The other 48 didn't handle Sylvania products, did they? A. No, but they handled many products.

Q. If a dealer moved into his territory in 1966 with Sylvania products in the quantity that he had then, would that not possibly create some price competition? A. Well, it would depend on whether the situation you described is as you described it or not.

Q. You certainly can't tell us under oath, Professor, that it wouldn't create that type of competition? A. I wouldn't say that it wouldn't. I wouldn't say that it would.

Q. You don't know? **[2964]** A. In the situation you have described, no.

Q. As a matter of fact, you don't know at this point, do you, based upon the information you have? A. No, sir.

Redirect Examination

By Mr. Popofsky:

Q. If one added one fact to my brother's hypothesis, namely, that the dealer coming in—and only hypothecating—as a custom charged $50 to $100 above the normal retail level or suggested retail levels, would that affect your opinion? A. Then I wouldn't think he would come in as a price-cutter.

Q. This chart which you have been shown, the dealer franchise structure in 1961, was based on interrogatories prepared in our office and Mr. Treviston's office? A. It related to Sacramento County.

Q. Your table says, "Metropolitan Statistical Areas, Sacramento, California, Five." A. Yes.

Q. Do you know if this table which is limited to Sacramento County corresponds with the table which

is referred to as the metropolitan area? [2965] A. No, it doesn't. We should have made that point. I am sorry. I guess we never did quite make the point about what these listed items were anyway in my table.

Q. Show us that [sic] that lists in Sacramento. A. I did say it is a standard metropolitan statistical area. This is a United States Government concept for measuring the size of metropolitan areas. It is based on counties and most of these areas involve more than one county. The Sacramento standard metropolitan statistical area involves three counties, which are Sacramento, Yolo County and the County above Sacramento—it is on the tip of my tongue—Placer County. So my table refers to the Sacramento metropolitan area, the three county area of which Sacramento is the center and by far the largest.

Q. This particular exhibit which I show you, which is in evidence but unmarked, shows—this is 1965—that Sylvania franchised dealer locations in Northern California, shows three dealers in Sacramento, one in Woodland and one in Roseville and one in Auburn. My question is: You could ascertain from this if the number five that appears in your table corresponds with this? A. Yes, there are five red dots in the three counties.

[2966] Q. And the information you got was from Mr. Treviston's office? A. Yes.

Q. And that was number five? A. Yes.

Q. While counsel is drawing your attention to this statement number three, this is a table showing the

information you got from Dun & Bradstreet's report and it also shows the number of Sylvania dealers in '65, among other things. A. Yes.

Q. Counsel drew your attention specifically to Albany. A. Albany, New York.

Q. Which on his allocation shows 87 percent of the T.V. dealers in Albany carrying the Sylvania brand. That is the way he did it. A. That is correct. I don't believe that is in fact correct but that was the number we were working with.

Q. Let's take counsel's number as correct. What was Sylvania's market share being represented in 87 percent, let us assume of— A. 5.7 percent market share.

Q. 5.7 percent market share with 87 percent representation on that assumption? [2967] A. Yes.

Q. As you go down this table could you just scan the market shares of Sylvania to these cities which are roughly the comparable size of Sacramento and tell us what they show? A. Well, they vary. The lowest figure is 1.5 percent share of sales in Dayton, Ohio, and the highest is the 12.6 percent in Sacramento.

The striking thing is that the number of dealers in Dayton is three, the number in the Sacramento metropolitan area, as we just defined it, is five.

So that the numbers of dealers in the two areas are very close to the same, very similar, three and five, and the total retail sales, all retail sales in the two areas are very close together, one point three billion in each case.

Yet the market shares are at opposite extremes which is just one piece of evidence of which I have observed so many pieces of evidence in this data that the exposure in terms of dealers doesn't seem to have any close association with the market shares in the various metropolitan areas in the television set industry.

In Sylvania's case, and that does suggest the importance of the other aspects of dealer behavior, that is the dealers that are advertising and aggressive and have good **[2967-A]** displays, and so forth, I presume —or whatever other characteristics there are—make sales and the dealers in Sacramento with the 12 percent share suggest very aggressive and successful competitive selling, whereas in other areas where Sylvania has many dealers, it doesn't have a large share.

That suggests that the dealers are simply not very aggressive competitors, not as aggressive as I am sure Sylvania would like them.

(Continued on the next page; nothing omitted.)

[2968] Q. Sir, throughout your cross-examination by Mr. Miller, he described the assumptions that you were given and talked about restrictive distribution practices of Sylvania and what have you. Just so everyone understands what you were asked with respect to the locations practices, would you please once again for us state what we asked you to assume was the policy with respect to franchises by location. A. It was my understanding that the assumed circumstances were that the manufacturer franchised the dealer to operate at a specific location and to carry

stock and so forth at that location, but that he could sell to anyone he chose at any place by any method that he so desired, that his market outreach was restricted only by the facts of distance, the cost of communication and doing business over a large business, [sic] not by any further restrictions on his ability to deal with anybody who might come along. That is my understanding.

Q. And that was the assumption we asked you to render an opinion based on? A. Yes.

Q. Now, counsel did cross-examine you, quite eloquently I might state, for two and a half hours. Did he draw to your attention, sir, any fact or any **[2969]** statement in your writing or any other circumstance which causes you now to alter the opinion you first voiced at that time? A. No, he did not.

Q. One last question. There was a series of questions concerning coercive power. Is a manufacturer the same sense of coercive power, as counsel has used it, exercising such power when it seeks legal—institutes legal proceedings to collect money allegedly due and owing for sets that have not been called [sic] for? A. I wouldn't say so.

Q. You wouldn't call that coercive power? A. No, I wouldn't.

* * *

Recross Examination

By Mr. Miller:

Q. As I understand your testimony, the number of outlets carrying Sylvania's brand in any given area does not directly affect Sylvania's market share in

that area, is that correct? A. That is an empirical observation based on the data I have. That statement is true.

[2970] Q. So that from your data on table 3 if, assuming there were five dealers in Sacramento in 1965, if we added five more there is no reason for you to believe from this empirical data that the market share of sales would have slipped under 12.6 percent as shown? A. I don't know whether it would have gone up or down.

Q. Lastly, he used the term market outreach. You mean by that sort of the radius of action that the dealer can hope to achieve from a given location? A. Yes.

Q. Do you know in miles what that radius was in Northern California for the average T.V. dealer in 1965? A. No, I don't.

* * *

Testimony of Thomas D. Rivers

[2985] Q. All right, sir. You mentioned the Maguire type of flooring. What was the relationship between the national credit office and Maguire? A. Well, when the Maguire program was first put into effect, the controller, Mr. Lockard, and Mr. Callahan, who was then national credit manager—retail, and myself were involved in setting up a program with Maguire on a contractual basis where the John P. Maguire Company, a highly respected, old-line factoring company, would perform certain services for Sylvania for fee. So our relationship was one of getting

a service from a company that was capable of giving us service and paying for it.

Q. In that relationship with Maguire, who actually extended the credit? A. Sylvania extended the credit in each and every case. The John P. Maguire Company performed the services and I can list a few of them, if you would like.

Q. Just briefly, please. A. They had access to the computer, they performed field audits, that is, floor checks, they had men in the field to verify the inventory by model, serial number, they **[2986]** collected money, and they also created various legal documents and made sure they were properly filed with the various secretaries of state throughout the country, and they also issued trust receipts as the end result of our invoice.

Q. Who was the secured party in the trust receipt, to your knowledge? A. The secured party was John P. Maguire Company, yes.

Q. Are you familiar with the terms of the Maguire flooring plan as understood by the national credit office of Sylvania in 1965? A. Yes.

Q. Could you briefly outline the terms of the plan? A. Their standard program was to give all dealers four months free floor plan, that is, the first four months there was no charge to the dealer. They also, at the end of four months, they would give the dealer an option, he could either pay it off in total at that time and, of course, if he did that, then he would never have an interest charge or service charge, or he could extend his floor plan for two 30-day periods by remitting to the John P. Maguire Company a service

charge for each of those 30-day periods. If at the end of the six-month period, which is the four months plus the two one-month extensions, all bets were off. He was supposed to pay for them, they were due in [2987] full and that was the end of it.

Q. Was it due in full immediately as a matter of practice? A. That is right, there was a note and the note was due and must be paid for.

Q. As a practical matter was any grace period given? A. Yes, we gave a five-day grace period, and this is a practical thing, because of the mails, you know, system, the distance from them, a remote dealer, and the city, holidays, and so forth.

* * *

Testimony of Lee Lockhart

[3160] * * * Q. You're comptroller of the home entertainment division? A. Yes.

Q. All right, sir. A. I told Mr. Rivers that when I returned from Puerto Rico I would determine what steps should be taken to protect Sylvania's interest in a series of receivables that seemed to be in trouble.

Q. Why, sir, did you place the credit hold? A. There were several reasons. The agreements which had been reached on a friendly basis in June were not being observed by Continental TV. The aging of the account was trending downhill in a hurry.

I also had been advised that Mr. Shahood had taken on a major order of Philco products, and that he was taking on a capital loan in the amount of another $40 or $50,000—I'm not sure which, and that the interest

on that [3161] loan would be forgiven if he bought a million dollars worth of products by the end of the calendar year 1965. I also had the information regarding the record of convictions against Mr. Shahood as reported in D and B.

Our exposure was significant at that time, and I acted as I believed a prudent credit man should: Stop, take a look and see what the facts are and decide what you have to do beyond that.

Q. And you went off to Puerto Rico. This wasn't to the Philco show, I take it? A. No, it wasn't.

Q. How long were you in Puerto Rico? A. I believe I returned Saturday of that week.

Q. What did you do next with connection with the Continental TV account? A. I debated with myself. I'm sure I had discussions with Rivers and Callahan, and by the 16th of September I decided what I had to do.

Q. What decision did you make, sir? A. I decided to reduce the amount of credit guide limit to Continental to $50,000.

Q. Why did you make that decision, sir? A. Because the exposure was getting out of hand. The exposure was getting out of hand. It was trending over to more and more matured and sold and unpaid that [3162] weren't being reported promptly. Mr. Shahood had not lived up to the agreement which had been reached in June at the June show, and it was time to cut it back and resolve the differences that existed and see if it didn't rebuild at some point and time when we would have a little more faith in it.

Q. All right, sir. What did you personally do in connection with the credit cut? A. I wrote a letter to Mr. Pedlow outlining a revocation of the June 22, letter—June 21 letter as it affected the timing of payment. In effect, I withdrew the figure concession I had granted in June. I told Mr. Pedlow that he wanted to get his records straightened out with regard to the 60 color television sets which had not yet been adjusted on the Maguire plan.

* * *

[3255] * * * Now, you recall there was a meeting held the night after the repossession? A. Yes.

Q. And this was held in Burlingame? A. Yes, sir.

Q. And it was at the Hyatt House? A. Yes, sir.

Q. All right. And by and large, all the gentlemen that helped to conduct that repossession gathered together, and you and Mr. Pedlow in substance conducted the meeting, correct? A. That's right, sir.

Q. And you told the people of this meeting to remember, did you not, that this was a Maguire action and not a Sylvania action? A. That's right, sir.

Q. And then in substance, each of those gentlemen reviewed the day's activities? A. That's correct.

* * *

COUNSEL'S JURY ARGUMENTS

[3338] Ladies and gentlemen, there are also types of antitrust cases, which this is, which are so pernicious, the policies are so pernicious to competition, so anti-competitive in their impact on our economy that

the law states there is no possible way to justify them. And, ladies and gentlemen, the two restrictions involved in this case are such marketing, distribution restrictions: Territorial restrictions and price maintenance restrictions are what lawyers and courts call per se violations of the act if they are enforced by contract, combination or conspiracy.

So despite what Mr. Popofsky told you in his opening argument, despite what Prof. Preston testified to on the stand, the facts are that it is only necessary in this case to find, number one, that Sylvania had a policy by which it restricted the territory in which and/or customers to which Continental could sell Sylvania products after it had purchased them from Sylvania.

* * *

[3378] * * * You will not be asked, as counsel pointed out, to make any decision about the reasonableness of the distribution practice or whether or not competition is or is not being bettered or furthered.

You will be asked only to decide what is the true character of the Sylvania practice. Was it the character that Continental suggests? Did it really involve price-fixing on the one hand and control over territories on the other, or did it, as we suggest, involve no more than a franchise by location practice?

If it is the latter we contend the instructions make it lawful. So you will be asked only to identify the character of the practice. In making that identification I think you should understand it is true that the antitrust laws are designed to further competition at

all levels—manufacturers, retail, intra-brand, inter-brand.

But it is also true that the law understands that if you franchise a dealer in San Francisco and a dealer in Sacramento, and do nothing else, that the manufacturer acting alone is not going to be in terribly much competition between the two because of distances. The same is true between Chicago and Miami, Houston and Dallas.

* * *

INSTRUCTIONS GIVEN THE JURY

[3434] * * * In this action, Continental asserts two claims: (1) that Sylvania and/or Maguire have violated Section 1 of the Sherman antitrust law; (2) that Sylvania and/or Maguire have wilfully and maliciously injured Continental's business in violation of California law.

I will first speak with respect to Continental's claim under the antitrust laws.

Continental asserts that Sylvania and/or Maguire have violated Section 1 of the Sherman antitrust law which provides as follows:

> "Every contract, combination . . . or conspiracy in restraint of trade or commerce . . . is . . . unlawful."

[3435] Continental's claim for damages which they claim they suffered as a result of the alleged violation of the antitrust law is based on Section 4 of the Clayton Act which provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . ."

The parties to this action have agreed that "trade or commerce", as defined by the antitrust laws, is involved in or affected by the acts of the parties and therefore, you need not decide that issue.

Continental's specific claim under the Sherman antitrust law is that Sylvania entered into a contract, combination or conspiracy with Sylvania dealers, including Handy Andy, Continental itself, and/or with Maguire, the purpose and effect of which was to establish and enforce a sales distribution policy restricting the locations from which and territories in which Sylvania dealers could resell Sylvania merchandise which the dealers had purchased from Sylvania; it also claims that an integral part of that distribution policy was to maintain and enforce the minimum resale prices suggested by Sylvania, and it further claims that a purpose was to prevent Continental from selling such merchandise from a location in Sacramento.

[3436] Continental further alleges that as a direct and proximate result of such contract, combination or conspiracy, Continental's orders for merchandise were not filled by Sylvania, that its Sylvania franchise was terminated, and Continental was thereby unable to obtain large quantities of color T.V. sets for resale. Continental asserts that as a consequence of this action, it suffered substantial damages in the form of

lost profits which could have been realized by it, had the defendants not engaged in the alleged illegal conduct.

Sylvania and Maguire deny that there has been any contract, combination or conspiracy or any unreasonable restraint of trade in violation of the Sherman antitrust law. They further contend that whether or not the Sacramento situation involved Sherman antitrust law violations as alleged by Continental, Sylvania's refusal to continue to supply merchandise to Continental was not motivated or caused by any claimed territorial restrictions on Continental; but rather, by other factors including good faith credit decisions and the alleged refusal by Continental to pay for merchandise received.

The first issue you should consider in passing upon the antitrust claim alleged by Continental is whether a contract, combination or conspiracy existed under the instructions I will give to you, which will also include **[3437]** directions as to when, under the antitrust laws, a contract, combination or conspiracy is deemed to be an unlawful restraint of trade in violation of the antitrust laws.

When in the course of these instructions, the word "person" is used, you should take that word as referring to any person or corporation, and then the word "conspiracy" is used, you should take that word as referring to a contract, combination or conspiracy.

The antitrust laws which prohibit a contract, combination or conspiracy in restraint of trade are not

directed at individual action. These words generally refer to a single concept, the essence of which is concerted action or conduct by two or more persons who attempt by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means.

A contract, as these words are here used, simply means an agreement, express or implied, between two or more persons. A conspiracy is likened to a partnership, in which each member becomes the agent of every other member.

The existence of similar conduct among various persons, or the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Similarity of conduct does not prove a conspiracy unless there are **[3438]** circumstances which logically suggest joint agreement as distinguished from individual action. That is to say, similarity of conduct is evidence which, with other evidence, may support a finding of conspiracy. But standing alone, similarity of conduct is not enough.

However, the evidence need not show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What a preponder-

ance of the evidence in this case must show, in order to establish proof that a conspiracy existed, is that the alleged members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

Nor need the evidence show that all of the means or methods claimed by Continental to carry out the alleged conspiracy were agreed upon; nor that all means or methods which were agreed upon were actually used or put into operation; nor that all persons alleged to have been members of the claimed conspiracy were such. What a preponderance of the evidence must show is that the alleged conspiracy was knowingly formed; that one or more of the means or methods **[3439]** alleged by Continental were agreed upon to be used in an effort to accomplish some object or purpose of the conspiracy which is alleged; and that two or more persons, including Sylvania and/or Maguire, were knowingly members of the alleged conspiracy.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but who happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before you the jury may find that Sylvania, Maguire, Handy Andy, or any other person, has become a member of a conspiracy, a preponderance of the

evidence in this case must show that the conspiracy was knowingly formed, and that Sylvania, its dealers, Maguire, Handy Andy or any other person who is claimed to have been a member, knowingly participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate knowingly means to act or participate voluntarily and intentionally, and not because of mistake, or accident, or other innocent reason. So, if a person with an understanding of the unlawful character of a plan, intentionally encourages, advises, or assists, for the purpose of furthering the undertaking or scheme, he **[3440]** thereby becomes a knowing participant—a conspirator.

One who knowingly joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether or not Sylvania, or Maguire, or Handy Andy, or any other person, was a member of a conspiracy, you the jury are not to consider evidence of what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence in this case as to his own conduct, by what he himself knowingly did or said.

However, if you should find from a preponderance of the evidence that a conspiracy existed, and that Sylvania or Maguire or any other dealer was a member of it, then the statements thereafter knowingly

made, and the acts thereafter knowingly done, by any person likewise found to be a member of the conspiracy, may be considered by you as evidence against each defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant or defendants; and provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or statement made or act done outside the court, by one person, may not be considered **[3441]** as evidence in this case against any person who was not present and heard the statement made, or saw the act done.

In your consideration of the evidence in this case as to the conspiracy charged by Continental, you should first determine whether or not the conspiracy existed as alleged.

If you conclude that the conspiracy did exist, you should determine whether or not Sylvania or Maguire or any other person alleged to be a member were knowing members of the conspiracy.

If it appears from a preponderance of the evidence in this case that the conspiracy alleged by Continental was knowingly formed, and that the defendants, or one or more of them, knowingly became members of the conspiracy, either at the inception or beginning of the plan or scheme or afterwards, then

the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

You will recall that I previously instructed you that you should first determine whether in fact a contract, combination or conspiracy existed. Also as I previously instructed you, before a contract, combination or conspiracy becomes unlawful under the antitrust laws, it must be in restraint of trade.

The purpose of the Sherman Act is to preserve and **[3442]** advance our system of free, competitive enterprise; to encourage, to the fullest extent practicable, free and open competition in the market place. The antitrust laws are intended both to protect and advance competition in the manufacturing of goods, and also in the sale and resale of those goods. This includes the aim of achieving competition among dealers at the retail level, including competition among dealers in a single brand, and among dealers in different brands.

So, any unreasonable interference, by contract, or combination or conspiracy with the ordinary, usual and freely competitive pricing or distribution system of the open market in interstate trade or commerce, constitutes an unreasonable restraint of trade, and is a violation of the Sherman antitrust laws. We say, therefore, that concerted action or conduct violates the antitrust laws when its purpose is, or likely effect will be, to unreasonably restrain competition in the market place.

In an antitrust case such as this, the test of reasonableness of a restriction does not turn merely on

whether Sylvania had a sound business reason or motive to adopt a restrictive distribution system. A restrictive arrangement can be unreasonable even if injury to competition is not the motive which leads to its adoption. Also, a distribution system may be unreasonable under the antitrust **[3443]** laws even though, from the viewpoint of the manufacturer using the system, it appears to be a good business practice.

Even in the absence of predatory motives, and assuming the existence of business purposes such as the incentive for profit or volume considerations, a distribution system is unreasonable under the antitrust laws if the effect of the system on competition in the market place is substantially adverse. That is to say, the promotion of self-interest alone does not make the restrictive conduct by a manufacturer reasonable under the antitrust laws. It is only if such conduct is not unlawful in its impact in the market place or if the self-interest of the manufacturer coincides with the concern of the antitrust laws for the preservation and promotion of competition that it can be viewed as reasonable.

However, a contract, combination or conspiracy, to establish and enforce a sales distribution policy restricting the locations from and territories in which Sylvania dealers may resell Sylvania merchandise purchased by them from Sylvania, and where an integral part of that distribution policy is to fix, maintain and enforce resale prices suggested by Sylvania and to prevent Sylvania dealers from selling the products below the suggested price, would be unlawful even if that policy were adopted without any motive to injure and in order to gain reasonable **[3444]** profits or a desired volume of sales. That is to say, concerted action of the type just described is among those restrictions which are violations of the antitrust laws whenever found. Whether the prices agreed to be fixed were or are reasonable or unreasonable is immaterial. Any such effort taken by a manufacturer pursuant to a contract, combination or conspiracy constitutes an unreasonable restraint of trade and is a violation of the Sherman antitrust law.

Therefore, if you find by a preponderance of the evidence that Sylvania, acting in concert with any one or more of its dealers or any other alleged co-conspirator, that is to say, by means of agreement, combination or conspiracy, attempted to or did establish and enforce a sales distribution policy restricting the locations from and territories in which Continental could resell products purchased from Sylvania, and as an integral part of that distribution policy, fixed, maintained and enforced resale prices on such merchandise which it had sold to Continental in order to prevent Continental from selling below the minimum prices suggested by Sylvania, then you should find that Sylvania violated Section 1 of the Sherman Antitrust law.

On the other hand, if you find by a preponderance of the evidence that Sylvania did not engage in a contract, combination or conspiracy to establish and enforce a sales **[3445]** distribution policy which re-

stricted the locations from or territories in which Continental could resell the merchandise which it had purchased from Sylvania, and did not fix or maintain and enforce the resale price on such merchandise, but rather, merely suggested a minimum resale price for its merchandise to its dealers, and took no further action to secure the dealer's compliance with the suggested minimum price other than announcement of its policy and a simple refusal to deal, you should find that Sylvania did not violate Section 1 of the Sherman antitrust laws. That is to say, Sylvania has the right, acting alone and independently for its own business purposes and interests, to franchise certain locations and to "suggest" to its dealers the minimum resale price at which Sylvania would like to have the dealer resell the products purchased from Sylvania. And it is lawful for a manufacturer, acting alone and independently and not pursuant to a conspiracy or combination with others, to stop dealing with or selling merchandise to a dealer who does not follow the manufacturer's suggested retail prices. If the dealer, acting alone and independently, without agreement with the manufacturer and without any other combination and without coercion, chooses independently to follow the location practice and independently follows the minimum resale price as suggested by the manufacturer, there would be no violation of the Sherman antitrust law.

[3446] However, a manufacturer may not enter into an agreement, combination or conspiracy with its dealers or with others to establish and enforce

a distribution policy for its products which would restrict the dealer's freedom upon resale of the products to a particular location and a particular price fixed by the manufacturer. That is to say, an agreement, combination or conspiracy entered into by a manufacturer, with the objective of restricting the dealer's freedom upon resale to a certain location or locations and maintaining or fixing the resale price of its products purchased from it by the dealer, and which is to be enforced through intimation or threats from the manufacturer that he will cancel the franchise and refuse to supply, or refuse to continue to supply his products to the dealers as a means of coercing the dealer to adhere to the location restrictions and the prices set by the manufacturer, is a violation of the antitrust laws.

So too, concerted action in the form of dividing territories in which a dealer may resell merchandise purchased from the manufacturer without resale price maintenance constitutes a violation of the antitrust laws. That is to say, where a manufacturer, by means of a contract, combination or conspiracy, restricts the territories within which a dealer may resell merchandise purchased from the manufacturer, such a restriction is unlawful regardless of **[3447]** whether or not that restriction is good business practice from the manufacturer's point of view and is likely to assure adequate volume or profits. Any agreement, combination or conspiracy by which a manufacturer interferes with the ordinary and usual forces of competition to restrict the territories within

which dealers may resell merchandise which they have purchased from the manufacturer or to keep one dealer from competing for customers or sales in a territory or area served by another dealer also constitutes a violation of the antitrust laws, whether or not the territories resulting seem reasonable or unreasonable.

Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion or control over the products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of Section 1 of the Sherman Act, regardless of the reasonableness of the location restrictions.

On the other hand, on this question of territorial or customer restrictions, you are instructed that a manufacturer, such as Sylvania, has a right, acting alone **[3448]** and independently for its own business interests, to select its customers, and for this purpose, the manufacturer may grant an exclusive "franchise" to certain dealers to whom, alone, he will sell his products. Also, it is lawful for the manufacturer to designate the location or locations of the place or places of business for which said dealer or dealers are franchised. It is also lawful for the manufacturer to decline or refuse to grant a dealer's request for a franchise at different or additional locations.

If the manufacturer's restriction stops at that point, that is to say, the manufacturer confines his own sales of the merchandise to selected dealers, and if the manufacturer's decision to so confine his sales was arrived at acting alone and independently for his own business purposes, and if competitive products are readily available in the market, the restriction, on these facts alone, would not be a violation of the antitrust laws.

In accordance with my previous instructions, in order to prove the essential elements of Continental's claim, the burden is on Continental to establish by a preponderance of the evidence, the following facts: First, that Sylvania or Sylvania and Maguire have violated the antitrust laws in one or more of the particulars as to which I have previously instructed you; and second, that **[3449]** Sylvania or Sylvania and Maguire's violations have been a proximate cause of some injury and consequent damage sustained by Continental in its business or property.

* * *

ARGUMENT ON POST-TRIAL MOTIONS

[3511] * * * Mr. Popofsky: Limiting to that point, Your Honor, first of all I would say their proposed findings are not in accordance with your instructions.

Secondly, there is no fact record which would sustain a threatened injury today.

The Court: You think it's—

Mr. Popofsky: We did it to them. They were cut off. They were cut off four years ago for some reason.

The Court: The testimony is that your program continues elbow room.

Mr. Popofsky: The testimony is that an announcement of elbow room is policy. The jury didn't, but that continues in Northern California today. I would say there is no case.

The Court: Don't you think the jury found that under their findings, they said there was conspiracy on that?

Mr. Popofsky: That's correct. For the years as to which the jury was given evidence of injury to this party in 1964 and 1965.

The Court: But the witnesses testified they continued as of now.

Mr. Popofsky: No, the witnesses said they understood that unilateral policy to continue today.

The Court: Well, of course that was the way they tagged it originally.

[3512] Mr. Popofsky: But there was evidence, for example in the manual that was presented as to '64 and '65. There is no evidence that manual is used today. All we know about today is that they say we try to follow something called elbow room.

The Court: There wasn't anything that the manual has been abandoned.

Mr. Popofsky: It wasn't pertinent to the trial.

The Court: There wasn't; was there?

* * *

[3572] * * * The Court: What's different about it?

Mr. Popofsky: What's different about it? I think what's different about it is that it's, despite your Honor's indications to the contrary, where a per se rule has been applied to a locations practice.

The Court: Oh, thank you.

Mr. Popofsky: I said that now and I smile when I say that because it's the essence part of our argument and Your Honor doesn't share that belief.

The Court: I sure don't.

Mr. Popofsky: I understand that.

The Court: I think if a boy that was in law school and represented Sylvania—

Mr. Popofsky: Pardon?

The Court: I say a law student, if he had represented Sylvania back during the times when Schwinn came down, would have said, "Look, Mr. Sylvania, you'd better watch out," and evidently they didn't have counsel back there then and they didn't pay any attention. They possibly didn't even know about it in Schwinn. But then along with all of the dissent decrees that the Department of Justice was entering along that time and then the Ripkin [sic] speech and things like that and just the **[3573]** general understanding in the antitrust bar would have led to that.

Mr. Popofsky: I think the general understanding, just to speak ex cathedrally, was that limits entering territories were a real danger.

The Court: No, did you know that was in his opinion?

Mr. Popofsky: Judge Perry's?

The Court: Judge Perry's opinion.

Mr. Popofsky: Well, we wrote a letter about that. Judge Perry clearly indicates that he draws a line between—

The Court: He said natural or orally, either one. Of course if you're going to let people out on the unilateral idea, why, you might as well strike the theory off the books.

* * *

[3575] * * * Mr. Popofsky: I think the jury found that one of the reasons which prompted Sylvania to terminate this dealer was a desire by Sylvania to enforce what the jury found to be an agreement concerning locations. But that was not the sole or even necessarily the primary reason as witnessed jury's findings.

The Court: Well, they put on the testimony.

Mr. Popofsky: Pardon?

The Court: The testimony was there. It was not a practical arrangement. You kept on pounding on the idea that you could say anything you wanted to in rebuttal. It came in any time.

Mr. Popofsky: That's right. The evidence was undisputed about that, but we also conceded you can't sell television sets in any great volume outside of 25 miles.

The Court: Anybody has a right to buy when they have to come 50 miles to get their repairs, so implicit in the finding of the jury, I would say would be that there wasn't any doubt but what it was impractical for Continental for people to make sales to people 50 miles away.

* * *

VERDICT, JUDGMENT AND NOTICE OF APPEAL
(Citations Are To Clerk's Transcript (CT))

[1304] In the United States District Court
for the Northern District of California

Civil No. 44251-TCC

John P. Maguire & Co., Inc., a corporation,
Plaintiff,

vs.

Continental T.V., Inc., a corporation, et al.,
Defendants.

Continental T.V., Inc., a corporation, et al.,
Cross-Claimants,

vs.

John P. Maguire & Co., Inc., a corporation, et al.,
Cross-Defendants.

[Filed Nov. 6, 1970]

VERDICT

A. *Antitrust Claim*

1. Did Sylvania Electric Products Inc. engage in a contract, combination or conspiracy in restraint of trade in violation of the antitrust laws with respect to **[1305]** location restrictions and price fixing as an integral part of a single distribution policy?

Yes	No
	V

2. Did Sylvania Electric Products, Inc., engage in a contract, combination or conspiracy in restraint of trade in violation of the antitrust laws with respect to location restrictions alone?

Yes	No
√	

3. Did John P. Maguire & Co., Inc., engage with Sylvania in a contract, combination or conspiracy:

a. As described in Question 1 above?

Yes	No
	√

b. As described in Question 2 above?

Yes	No
	√

4. If the answer to Question 1, 2, or 3, is "Yes," did Continental T.V., Inc., sustain damage to its business or property as a proximate result of such violation of the antitrust laws?

Yes	No
√	

[1306] 5. If the answer to Question 4 is "Yes", what is the amount of such damage?

$591,505

B. *Claim of Wilful and Malicious Injury*

1. Did Sylvania Electric Products, Inc. wilfully and maliciously cause injuries to Continental T.V.'s business in violation of California law?

Yes	No
	√

2. Did John P. Maguire & Co., wilfully and maliciously cause injuries to Continental T.V.'s business in violation of California law?

Yes	No
	√

3. If the answer to Question 1 and/or Question 2 is "Yes", did Continental T.V., Inc. sustain damage to its business or property as a proximate result of such violation of California law?

Yes	No

4. If the answer to Question 3 is "Yes", what is the amount of such damage?

$ _____
Actual

$ _____
Punitive

/s/ R. E. McKorn Jr.
Jury Foreman
November 6, 1970

[1366] In the United States District Court
for the Northern District of California

No. 44251

John P. Maguire & Co., Inc., a corporation,
Plaintiff,

vs.

Continental T.V., Inc., a corporation; A&G Sales, a corporation; Sylpac, Inc., a corporation; S.A.M. Industries, Inc., a corporation; George N. Shahood and Margaritha H. Shahood,
Defendants.

Continental T.V., Inc., a corporation, A&G Sales, a corporation, Sylpac, Inc., a corporation, and S.A.M. Industries, Inc., a corporation,
Cross-Claimants,

vs.

John P. Maguire & Co., Inc., a corporation, and Sylvania Electric Products, Inc., a corporation,
Cross-Defendants.

[Filed Dec. 11, 1970]

JUDGMENT

Trial of the above case commenced September 25, 1970, [1367] and the jury was duly and regularly impaneled to hear and consider the questions of fact respecting legal claims of cross-claimants herein. Cross-

claimants were represented at said trial by Glenn E. Miller of the office of Johnston, Miller and Giannini; Wayne H. White of the office of Rudy, Rapoport & White, Inc.; and Lawrence A. Sullivan, Esq. and cross-defendants were represented by M. Laurence Popofsky and Richard L. Goff of the office of Heller, Ehrman, White & McAuliffe.

The evidence was heard by the jury, the jury was instructed, and the case was submitted to the jury. The jury was instructed to render its verdict on each of several special interrogatories propounded to it. On November 6, 1970 the jury returned its verdict on each of said special interrogatories (to the extent applicable). Said verdict included a verdict in favor of cross-claimants and against cross-defendant, Sylvania Electric Products, Inc. ("Sylvania") for single damages in the sum of $591,505, and in favor of cross-defendant, John P. Maguire & Co., Inc. and against cross-claimants. Said verdict has been ordered filed. Over the objections of Sylvania, the amount of said verdict for damages in favor of cross-claimant against Sylvania has been trebled to $1,774,515 as mandated by 15 USC 15 (otherwise known as § 4 of the Clayton Antitrust Act).

Cross-defendant, Sylvania, has entered no objection to an award of attorneys' fees in the amount of $275,000 (said lack of objection, however, being without prejudice to Sylvania's right of appeal from the entire judgment, including attorneys' fees, or any portion of the judgment) and this Court finds that said sum of $275,000 constitutes a reasonable attorneys' fee in this case for counsel for cross-claimants.

Cross-claimants have moved the Court for injunctive [1368] relief based on the evidence adduced at trial. The Court has considered said motion in light of all the evidence, and the Court finds that cross-claimants are entitled to injunctive relief in the respects hereinafter set forth on the ground that such relief is necessary and appropriate to protect cross-claimants against threatened loss or damage by a violation of the antitrust laws (see 15 USC § 26). The Court further finds that except as injunctive relief is specifically granted hereinafter, cross-claimants are not entitled to any other equitable or injunctive relief requested by them.

The parties have stipulated that the entire judgment in favor of cross-claimants against Sylvania and execution thereon may be stayed pending appeal therefrom and until said judgment (if affirmed on appeal) becomes final, without the necessity of bond or other security.

Plaintiff John P. Maguire & Co., Inc. and all of the defendants herein have stipulated to a judgment in favor of plaintiff and against said defendants in the sum of $145,000. They have further stipulated that one-half of the cash deposited by defendants herein to obtain release of attachment shall be applied upon said judgment, and the other half shall be returned to defendants, and that execution on the balance due on said judgment shall be stayed until final judgment on the claims asserted by the cross-claim herein, without the necessity of bond or other security.

1. It Is Therefore Ordered, Adjudged and Decreed, that the jury's verdict a copy of which is attached hereto, be enrolled.

2. It Is Further Ordered, Adjudged and Decreed, [1369] pursuant to said jury verdict, that cross-claimants have and recover of and from cross-defendant Sylvania Electric Products, Inc., the sum of $1,774,515, said sum being the verdict of the jury trebled as a matter of law, plus costs in the sum of $18,000 and an attorney's fee in the sum of $275,000, together with interest on said sums to run at the rate of 7% per annum from the date of entry of this judgment.

3. It Is Further Ordered, Adjudged and Decreed that cross-defendant, Sylvania Electric Products, Inc., and its agents and employees, be, and they hereby are, perpetually enjoined and restrained from directly or indirectly imposing, inducing, or securing any condition, agreement or understanding, either by oral or written statement or by acts of retaliation, that limits the freedom of any one or more of the cross-claimants as to where or to whom it or they may display or resell products sold by said cross-defendant and acquired by one or more of cross-claimants, provided, however, that nothing herein shall either require said cross-defendant to sell any products to one or more of cross-claimants or restrain said cross-defendant from unilaterally refusing to sell products to any of cross-claimants. Except as hereinabove expressly provided, cross-claimants' request for equitable and injunctive relief is hereby denied.

4. It Is Further Ordered that execution on the judgment in favor of cross-claimants and against Sylvania Electric Products, Inc. set forth in paragraph 2 aboye, and the injunctive relief set forth in paragraph 3 above, are hereby stayed pending appeal therefrom and until said judgment (if affirmed on appeal) becomes final, and, pursuant to the parties' stipulation, that no bond or other security shall be required as a condition of this stay.

[1370] 5. It Is Further Ordered, Adjudged and Decreed, pursuant to said jury verdict, that cross-claimants recover nothing under their cross-claim from cross-defendant, John P. Maguire & Co., Inc.

6. It Is Further Ordered, Adjudged and Decreed that plaintiff John P. Maguire & Co., Inc. have and recover of and from defendants, Continental T.V., Inc., a corporation, A&G Sales, a corporation, Sylpac, Inc., a corporation, S.A.M. Industries, Inc., a corporation, George N. Shahood Margaritha H. Shahood the total sum of $145,000 (which sum shall include principal, pre-judgment interest, costs and attorneys' fees) together with interest on said sum to run at the rate of 7% per annum from the date of entry of this judgment.

7. It Is Further Ordered, Adjudged and Decreed that the cash which was deposited by defendants herein in order to obtain release of attachment, and all accumulated interest earned thereon, as remains on deposit shall be paid as follows: one-half of the total of said cash deposit plus interest shall be paid immediately to plaintiff, John P. Maguire & Co., Inc. in

partial satisfaction of the foregoing judgment in favor of plaintiff against defendants; the remainder of said deposit plus interest shall be paid to defendants as their interests may appear.

8. It Is Further Ordered that, except for the payment specified immediately above, execution on said judgment in favor of plaintiff against defendants is hereby stayed until such time as there is a final judgment on the claims asserted by the cross-claim herein against cross-defendant Sylvania Electric Products, Inc., and that pursuant to the parties' stipulation no bond or other security shall be required as a condition of **[1371]** such stay.

Dated, Dec. 11, 1970.

/s/ Tom C. Clark by CDR
The Honorable Tom C. Clark,
sitting by designation as U.S.
District Judge, U.S. District Court.

[1437] In the United States District Court
for the Northern District of California

Civil No. 44251 TCC

John P. Maguire & Co., Inc., a corporation,
Plaintiff,
vs.
Continental T.V., Inc., a corporation, et al.,
Defendants.

Continental T.V., Inc., a corporation, et al.,
Cross-Claimants,
vs.
John P. Maguire & Co., Inc., a corporation,
et al.,
Cross-Defendants.

[Filed Mar. 2, 1971]

NOTICE OF APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS FROM DESIGNATED PORTIONS OF THE JUDGMENT ENTERED HEREIN

Notice is hereby given that Sylvania Electric Products Inc., a corporation, cross-defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from designated portions of the final judgment filed in this action on December 11, 1970, and duly entered of record on December 18, 1970, as follows:

[1438] 1. From paragraph 1 of said judgment insofar as it enrolls those portions fo the jury's verdict adverse to Sylvania Electric Products Inc.

2. From paragraph 2 of said judgment and the whole thereof.

3. From paragraph 3 of said judgment and the whole thereof.

Dated: March 2, 1971

M. Laurence Popofsky
Richard L. Goff
Douglas M. Schwab
Heller, Ehrman, White & McAuliffe
By M. L. Popofsky
Attorneys for Cross-Defendant-
Appellant Sylvania Electric
Products Inc.

Supreme Court, U. S.
FILED
AUG 31 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC and S.A.M. INDUSTRIES, INC., *Petitioners,*

vs.

GTE SYLVANIA INCORPORATED, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT GTE SYLVANIA INCORPORATED IN OPPOSITION

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In the Supreme Court
OF THE
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OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC and S.A.M. INDUSTRIES, INC., *Petitioners,*

VS.

GTE SYLVANIA INCORPORATED, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT GTE SYLVANIA INCORPORATED IN OPPOSITION

After eleven years of litigation including five years of appellate proceedings, the majority of the Court of Appeals for the Ninth Circuit, sitting *en banc,* has correctly held that the legality of vertical locations agreements unaccompanied by price fixing, customer allocation or similar trade restraints, is properly tested under the rule of reason. Respondent GTE Sylvania Incorporated (hereinafter "Sylvania") submits that the holding below is amply supported by antitrust and economic doctrine and is con-

sistent with all pertinent authority. Accordingly, the Petition for Writ of Certiorari should be denied.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A-1-114)[1] is presently unreported. The verdict of the jury in the District Court in the form of answers to special interrogatories is not reported but partially quoted at Pet. App. A-11-12, fn. 6. After rendition of the jury verdict the District Court entered contested findings of fact and conclusions of law which are not reported (Pet. App. B-115-129). The status of these findings is discussed in the majority opinion at Pet. App. A-13, fn. 7.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1976. The Petition for Writ of Certiorari was docketed on July 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

While the petition both trifurcates and obscures the question presented, the single issue is the following:

> Did the Court of Appeals err in holding that a distribution system entailing vertical agreements between a manufacturer with a small market share and its direct buying retail dealers specifying the locations from which the latter are authorized to sell brand-named products is to be adjudged under the rule of reason rather than under a doctrine of *per se* illegality derived from *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)?

[1] "Pet. App." refers to the appendices to the Petition for Writ of Certiorari.

STATUTES INVOLVED

The pertinent statutory provisions are set forth at Pet. App. C-130-133.

COUNTERSTATEMENT OF THE CASE

As petitioners would have it, this protracted controversy involves, not the legality of locations agreements, but the refusal of the majority below to apply the *Schwinn* rule of *per se* illegality to "territorial restraints" squarely within that rule's ambit. But while the superficial similarities between the Sylvania practice and that condemned in *Schwinn* are obvious, it is the differences which frame the question presented. For this record establishes that Sylvania's practice of designating the location at which its retail dealers are authorized to sell Sylvania brand merchandise involves no restriction upon the customers to whom or the territories into which a franchised dealer might advertise, sell or deliver Sylvania products. While economic considerations doubtless limit the competitive capabilities of a particular dealer operating at an approved location, the practice was conceived and implemented with pro-competitive objectives and effects comparable to those which accompany the traditionally lawful exclusive distributorship. As such, it

is the kind of practice specifically recognized as lawful by the decree on remand in *Schwinn* itself. 291 F.Supp. 564, 566 (N.D. Ill. 1968).

While the pertinent facts are fully and fairly set forth in the majority opinion below (Pet. App. A-2-16), petitioners' distortions make it necessary to submit the following summary as a counterstatement.

(a) Background and competitive purposes.

This action arises out of 1964-1965 business relationships between Sylvania, a manufacturer of television products, John P. Maguire & Co., Inc. ("Maguire"), a corporation engaged in financing the inventory acquisition of Sylvania products by franchised Sylvania dealers, and Continental T.V., Inc. and affiliates, a Northern California retailer of Sylvania and competing products. Suit was commenced by Maguire[2] to collect amounts due and unpaid by Continental under promissory notes and trust receipt contracts.[3] Continental's response to Maguire's debt collection suit was a cross-claim against Maguire and Sylvania for alleged violations of the antitrust laws.

So far as here pertinent, Continental's antitrust claims focused on Sylvania's "elbow room policy" conceived and implemented in 1962 as a competitive response to a disastrous market position. Prior thereto, Sylvania attempted to maintain a "saturation" type distribution system in-

[2]The petition errs in stating that Sylvania filed the suit. (See Petition, p. 3)

[3]Judgment in favor of Maguire in the sum of $145,000 as principal, prejudgment interest, costs and attorneys' fees, was subsequently entered.

volving the sale of products to independent or company-owned distributorships without reference to locale and limited only by the distributor's ability to pay. By the late 1950s Sylvania's national market share had deteriorated to 1 or 2 percent. With the introduction of color and the concomitant increase in production and distribution costs, Sylvania was confronted with the stark choice of either improving its competitive position through a different distribution technique or going out of the business of producing and selling television and related products. (Pet. App. A-pp. 2-5; *pace* Petition, p. 5). Sylvania's solution was to adopt a franchise concept of limited rather than "saturation" distribution designed to attract select dealers willing to hold themselves out as authorized Sylvania outlets.

(b) Sylvania's locations practice.

The new distribution system involved a phase-out of wholesale distribution in favor of direct factory-retailer sales to "franchisees" operating from approved locations. Under this system Sylvania reserved to itself the right to determine whether it would sell to a particular retailer for resale as an authorized Sylvania dealer at a designated location. This was true whether or not a particular dealer was authorized to sell Sylvania products at one or more locations. Put simply, a dealer authorized *somewhere* as a Sylvania franchisee was not authorized *everywhere;* Sylvania did not franchise chains as such.

The policies employed in implementing Sylvania's locations practice may be briefly enumerated (Pet. App. A-p. 5-6):

1. No franchisee or dealer had the right to veto Sylvania's determination with respect to approval of

another franchise location in a particular market area; Sylvania made its determination to franchise or not with reference to such factors as market penetration and quality of prospective dealer, but without consultation with its existing authorized dealers.

2. While the purpose of the "new policy" was to "space" dealer locations, Sylvania at no time entered into any agreements or understandings restricting the freedom of an authorized Sylvania dealer operating from the franchise location to sell to anyone wherever situated.[4]

3. Sylvania encouraged its authorized dealers to handle competing lines, including RCA, Zenith, Philco and other major brands, and entered into no understandings or agreements limiting a dealer's independent choice with respect thereto.

4. Sylvania did not engage in any understandings or agreements whereby a particular dealer was afforded an "exclusive"; at all times Sylvania reserved the right to authorize a Sylvania dealer to function in an area in competition with an existing dealer.

(c) Competitive effects.

From 1962 to 1965 Sylvania was able to expand its market share to approximately 5 percent nationally and sus-

[4]Although Sylvania contended at trial that its locations practice was unilateral in character (see *United States v. Colgate & Co.*, 250 U.S. 300 (1919), the jury found otherwise. Accordingly, the proceedings on appeal have been pursued on the premise that Sylvania's locations practice in Northern California in 1965 involved agreements between Sylvania and its dealers impliedly restricting the latter's ability to transship inventory owned by them to new locations for resale as Sylvania dealers without Sylvania's prior approval. See Pet. App. A-5, fn. 4.

tain itself as an effective competitor in a television market dominated by RCA and Zenith. In the opinion of Sylvania management its revival as an interbrand competitive factor was a direct result of its new distribution policies. (Pet. App. A-6)

Sylvania's success was particularly striking in the greater Sacramento area where its market share exceeded 10 percent in 1965. While one retail dealer, Handy Andy, enjoyed the largest share of the Sacramento business, other franchised dealers operating from locations in suburban Roseville and Woodland—locations well within the 25-50 mile radius of practical marketing—guaranteed effective competition in the Sylvania line in the Sacramento market area.

Market shares aside, during 1964-1965 Sylvania's locations practice resulted in fewer but select dealers competing in the Northern California area with at least two or more such authorized dealers serving every metropolitan market larger than 100,000 in populace. In all relevant Northern California areas, there were a large number of dealer outlets and available brands.[5] Sylvania's location practice thus imposed no meaningful restriction on customer choice.[6] Nor did it have any adverse impact on prices or volume: throughout the relevant period there

[5]For example, in Sacramento in 1965 there were approximately 100 retail dealers and approximately 25 brands on the market.

[6]Both at trial and now in the petition, p. 4, fn. 1, Continental cleaves to a phrase in an early intracompany manual for salesmen which referred to "elbow room" as eliminating same brand competition. But as all of the witnesses recognized, this language was essentially inaccurate in view of the fact that the locations practice—while concededly limiting the *number* of intrabrand competitors—was never applied in Northern California in such a way as to prohibit competition.

was a steady increase in volume and decrease in prices, both for Sylvania merchandise and in the television market generally.

(d) Sylvania-Continental business relationship.

Relationships between Continental and Sylvania were both meteoric and stormy. (See Pet. App. A-6-12). Having commenced in May 1964, they all but ruptured in July 1965 when Sylvania declined to accede to Continental's demand that Sylvania refuse to franchise a competitor of Continental in the San Francisco area. Continental thereupon cut back both its purchases and its payments. Pet. App. A-8.

As autumn approached Sylvania's credit department became increasingly concerned with Continental's late payments for merchandise and related defaults in its financial obligations. To cap matters, in late August 1965 Sylvania's headquarters credit personnel learned for the first time that Continental's principal shareholder and president previously had been convicted of three offenses involving the writing of bad checks and misappropriation of government funds. As a consequence, on September 16, 1965 Sylvania reduced Continental's credit limit from $300,000 to $50,000. Pet. App. A-9-10.

Continental reacted to the credit cut by withholding all payments owing to Maguire for Sylvania merchandise. At about the same time Continental elected to move Sylvania brand merchandise from one of its authorized locations to a newly opened Sacramento facility. Continental coupled this movement with a request to Sylvania's field personnel for an immediate grant of a franchise for the new store. When this request was refused Continental continued to sell the Sylvania-brand goods in Sacramento while declining to pay for any merchandise subject to the Maguire financing arrangements. Pet. App. A-8-9.

When Continental's accumulated debt reached some $62,000, unsecured by merchandise, Maguire filed this action and Sylvania notified Continental that its franchise as a Sylvania dealer was terminated. Pet. App. A-10-11.

(e) Jury Instructions.

At trial Continental claimed that the damages it suffered following the rupture of relationships was proximately caused by Sylvania's adoption and enforcement of its locations practice. While Sylvania contended otherwise, it also argued that if the legality of that practice were dispositive, then the practice should be evaluated by the jury under appropriate rule of reason instructions. But the District Court rejected that view in favor of a *per se* rule: it specifically charged the jury that any effort by Sylvania "to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania" would be a violation of the antitrust laws "regardless of the reasonableness of the locations restrictions."[7] As the majority below observes,

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[7]Petitioners suggest that the trial court's instructions simply put to the jury the question of whether Sylvania had imposed a territorial restraint of the kind struck down in *Schwinn* and advised the jury that, if so, Sylvania's restraint was illegal *per se*. (Petition, p. 6, citing to the dissent). While it is fair to say that the jury instructions were ambiguous in many respects, it is nonetheless clear that the jury was charged that Sylvania's locations practice, if implemented by vertical agreements, was illegal *per se*. This prejudicial instruction was reversible error regardless of whether other instructions—including some drawn from Sylvania's rule of reason proposals—were correct. The majority below accurately interpreted the critical instruction as a *per se* condemnation of locations agreements. (Pet. App. A-14-16).

a verdict against Sylvania was thus "virtually assured". (Pet. App. A-15)

(f) Ninth Circuit proceedings.

By a 7-4 majority the Court of Appeals for the Ninth Circuit reversed the District Court's judgment and equitable decree entered in favor of Continental and remanded the case for a new trial. It concluded that the District Judge, the Honorable Associate Justice Tom C. Clark (Ret.), sitting by designation, erred in applying a *per se* rule derived from *Schwinn* to the challenged Sylvania practice. That holding made it unnecessary for the Ninth Circuit majority to address Sylvania's additional assignments of error, namely, (1) that even if Sylvania's locations practice could be held illegal *per se* under *Schwinn,* Sylvania was wrongfully denied the benefit of, and jury instructions respecting, the "failing company" defense; and (2) that even if this Court's 1967 opinion in *Schwinn* renders a locations practice illegal *per se,* that rule should not be applied retroactively to Sylvania's 1964-5 conduct. Pet. App. A-53, fn. 41. Sylvania has pursued these defenses throughout and preserves them here.

ARGUMENT

I. THE COURT OF APPEALS HOLDING IS CORRECT AND DOES NOT CONFLICT WITH SCHWINN

For petitioners, analysis of the legality of locations agreements begins and ends with *Schwinn.* Dismissing the differences between the Sylvania and Schwinn distribution systems as "trivial", petitioners argue that *Schwinn* mandates *per se* illegality for all "vertical resale re-

straints which effectively segregate resellers into separate geographical markets." Petition, pp. 11-12. Erroneously postulating that Sylvania's location practice effects such a segregation, petitioners claim that a writ must issue in order to insure the continued validity of *Schwinn.*

But this Court's decision in *Schwinn* was more discrete in application than petitioners suggest. The restrictions declared illegal in *Schwinn* (1) prohibited wholesalers from selling bicycles outside of specifically drawn exclusive territories, and (2) prohibited both wholesalers and franchised retailers from selling to any but designated classes of customers. This set of rigid contractual restrictions yielded this Court's holding that it is *per se* unlawful "for a manufacturer to seek to restrict and confine *areas or persons* with which an article may be traded after the manufacturer has parted with dominion of it . . ." 388 U.S. at 379; (emphasis added).

The vice condemned in *Schwinn* was thus the rigid compartmentalization of the distribution system into separate units effectively isolated from all intrabrand competition. Sylvania's locations practice differs materially. Pet. App. A-44. Here, there was no contractual restraint upon the territories into which or the customers to whom franchised dealers might resell. A franchised dealer was contractually free to advertise, sell or deliver Sylvania products to anyone in any territory it might choose with economic practicality providing the only limitation. And in every metropolitan area in Northern California—including Sacramento—customers had a choice among competing Sylvania dealers who were located within the 25-50 mile radius in which volume selling was feasible. Any dealer who

might be inclined to charge too high a price or provide poor service was always subject to a meaningful intrabrand competitive check—a check heightened by the fact that Sylvania at all times reserved the right to franchise additional dealers free of any "veto" power at the dealer level. Pet. App. A-20-1; 45-7.

It is, of course, plain that Sylvania's locations practice had the purpose and effect of limiting the *number* of Sylvania dealers who might engage in intrabrand competition to that determined desirable by Sylvania.[8] Nor is it disputable that a dealer's ability to compete in territorial terms is necessarily conditioned by such factors as its financial capacity, volume, profit margins, selling methods and the like. But similar limitations upon intrabrand competition and upon dealer territorial capabilities likewise inhere in such distribution practices as exclusive dealerships, area of primary responsibility covenants and profit pass-over requirements—practices which have been generally recognized as lawful in non-monopoly situations after *Schwinn*. (See Pet. App. A-33-44).

Rather than stifle competitive market forces, Sylvania's locations practice served legitimate pro-competitive objectives. The uncontradicted evidence shows that Sylvania's pre-1962 use of "saturation" distribution proved so unsuccessful that Sylvania was faced with the prospect of going out of the television business entirely. Sylvania concluded that a "spaced" distribution system of select, high-volume

[8]It is useful to observe that insofar as the practice involved the denial to an existing dealer of a franchise to sell products in a new location such as Sacramento, it had no greater effect upon competition than lawful refusal to grant a franchise to a completely new dealer.

dealers who would vigorously promote the line was its only means of remaining a viable interbrand competitor. By limiting the number and proximity of franchised outlets Sylvania was able to offer a marketing area and potential clientele from which its dealers could obtain a reasonable rate of return upon their investment of time, effort and money. This technique enabled Sylvania and its dealers to become effective and vigorous competitors in the interbrand market for television products. As the majority below perceives, nothing in *Schwinn* dictates that these pro-competitive purposes and effects be disregarded. However much petitioners may castigate the Court below for declining to place Sylvania's locations practice in the *Schwinn* mold, it did so for good and substantial reasons.

Petitioners' remaining attacks upon the majority opinion involve an attempt to avoid the exclusive dealing precedents and an appeal to *stare decisis*. Both warrant brief response:

A. Economic freedom and the exclusive dealing precedents:

All contracts restrain, as Justice Brandeis noted in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Nonetheless, petitioners urge review of Sylvania's locations practice because it contractually deprives "independent retailers of the power to act for themselves" thereby offending "a vital social goal of the Sherman Act." Petition, p. 13. This thesis, which echoes Judge Browning's dissent below (Pet. App. A-88-90), is fleshed out in petitioners' discussion of the exclusive dealing precedents, notably *Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). Such authorities, it is said, are dis-

tinguishable because they involve only self-imposed inhibitions upon a manufacturer's own sales decisions—not resale restrictions upon independent dealers. (Petition, p. 17)

But petitioners' argument is surely misconceived. In contractual terms, the traditional exclusive distributorship involves limitations upon the manufacturer's "economic freedom" every bit as "restrictive" as that agreed to by the dealer in a locations practice. As noted in Pollock, *The Schwinn Per Se Rule: The Case for Reconsideration*, 44 Antitrust L.J. 557, 570-71 (1975) the exclusive distributorship

> ". . . interferes with the manufacturer's freedom in choosing customers during the term of the agreement; 'forecloses' any other person from getting a distributorship in that territory; and 'forecloses' retailers from buying from any other distributor located in that territory. Nevertheless, as *Schwinn* itself recognizes, such a restraint is tested under the Rule of Reason, and indeed comes close to the status of per se *legality*." (footnotes omitted)[9]

Moreover, it is surely plain that both the purposes and the effects of distribution systems employing exclusive

[9] *A fortiori*, if it is lawful for a manufacturer to assure one dealer that his will be the "exclusive location" for sales of the manufacturer's products within a prescribed territory, then, surely, it is also lawful for a manufacturer to keep that commitment. And this he can only do by restricting other dealers from selling his products from locations within that territory. See Pet. App. A-38-9. As stated by former Assistant Attorney General (Antitrust Division) Donald S. Turner:

> "The point is very simple: If I set up a dealer in Baltimore and I don't want any more dealers in Baltimore, the only way I can make that stick is to tell the Washington dealer that he can't set up an establishment in Baltimore." 1968 Antitrust Law Symposium of the New York State Bar Association, 64.

dealing arrangements are substantially identical to—if not more restrictive than—those involving locations practices. The whole point of exclusives, after all, is to further interbrand competitive capabilities by providing select dealers with territories substantially insulated from intrabrand competition. While partaking of purposes similar in part, a locations practice like Sylvania's is less restrictive in effect because it entails multiple dealers in every major market area.

As *Schwinn* itself recognizes, the exclusive dealing practice is subject to the rule of reason because it, like a locations practice, can serve legitimate pro-competitive interests. While the party subject to the "restraint" might differ, Sylvania's locations practice possesses the same pro-competitive potential as "exclusives"—a potential fully realized on the evidence adduced. The mere identity of the contracting party restrained—be it manufacturer or distributor—cannot be dispositive;[10] nor can it justify review of the majority opinion below.

B. Judicial economy and stare decisis:

Petitioners berate the majority below, *inter alia*, for distinguishing *Schwinn* on a "wholly specious" factual

[10] With respect, Judge Browning's dissent ignores the reality of distributor bargaining power in its analysis of the issue. In modern American commerce retail chains often possess equal or greater bargaining power than that possessed by the manufacturer, particularly when, like Sylvania, the manufacturer is struggling to obtain a meaningful share of the market. Judge Browning—like petitioners—would derive a *per se* rule from an unsubstantiated economic model in which the manufacturer is invariably supreme in "imposing" its contractual will upon its seemingly hapless dealers. Petitioners' own conduct in the San Francisco market area, as recited in the majority opinion at Pet. App. A-8, belies the efficacy of both the model and the analysis.

basis "which is a transparent farce." Petition, pp. 16, 19. As petitioners would have it, if the literal language of *Schwinn* is capable of application to a vertical trade practice, it must be so applied—with or without economic rhyme or reason. To hold otherwise is to compel litigants to "set sail on a sea of speculation in a prophetic effort to tell whether the resulting injury is offset by asserted benefits to interbrand competition." Petition, p. 14. Thus *certiorari* should issue in order to expand and cleanse *per se* doctrine in the vertical context.

But the majority opinion below scarcely warrants the invective with which it is here greeted. Far from "rewriting the law announced by this Court" (Petition, p. 22), that opinion demonstrates a sensitive regard for the prior teachings of this Court and the appropriate economic analysis which underlies them. Its overriding focus is on the central concern of the antitrust laws, namely, whether competition will be ill or well served by the practices under scrutiny. Such a focus is mandated by *Northern Pacific Railway Co. v. United States,* 356 U.S. 1 (1958), where this Court held that a *per se* rule may be applied only after it has been found that a particular practice has a "pernicious effect on competition and lack[s] . . . any redeeming virtue". 356 U.S. at 5. Compare *White Motor Co. v. United States,* 372 U.S. 253, 262 (1963). Indeed, in *Schwinn* itself this Court, before reaching its *per se* result, stated that "our inquiry is whether, assuming nonpredatory motives and business purposes and the incentive of profit and volume considerations, the *effect upon competition in the marketplace is substantially adverse.*" 388 U.S. at 375 (emphasis added). The majority opinion simply remits the controversy to the trier of fact for such an

inquiry under instructions allowing all pertinent economic purposes and effects to be weighed.

Petitioners argue that such an inquiry should be proscribed because it is judicially difficult and inefficient. Petition, pp. 14-15. That, of course, is a traditional reason for invoking *per se* doctrine with respect to practices demonstrated to be "hard core" offenses. But whether or not a *per se* rule actually yields the asserted benefits to judicial ease and economy,[11] the interests advanced are not sufficiently weighty to justify eschewing a meaningful factual analysis of actual purposes and effects particularly when, as here, the challenged practice is demonstrably beneficial to competition. *Per se* rules ought not to be stretched beyond the competitive concerns which gave them birth and breadth. See Elman, *Petrified Opinions and Competitive Realities,* 66 Colum. L. Rev. 625, 627 (1966).

To buttress the "efficiency" concern petitioners argue that *United States v. Topco Associates,* 405 U.S. 596 (1972) "flatly rejects possible benefit to interbrand competition as a basis for sanctioning damage to intrabrand competition". Petition, p. 19. But as petitioners themselves recognize, *Topco* involved horizontal territorial and related restraints—practices with respect to which "competitive damage" is readily apparent. It is otherwise in a vertical context: when, as here, a manufacturer has joined with its distributors to form a distribution system engaged in an economic battle with competing brands, "it is myopic to concentrate only on the possible diminution of *intra*brand competition and ignore the advantages to *inter-*

[11] In the context of vertical practices it may be doubted whether such benefits actually accrue in light of the post-*Schwinn* litigation experience. See cases cited Pet. App. A-33 *et seq.*

brand competition. Elementary cost-benefit analysis would seem to require consideration of the *net* competitive effect of a vertical restriction—and not merely the effect on one side of the balance sheet." Pollock, *The Schwinn Per Se Rule: The Case for Reconsideration,* 44 Antitrust L.J. 557, 586 (1975) (emphasis in original).[12] See Pet. App. A-45-6.

Petitioners frankly recognize that their attack upon the majority opinion is based upon *per se* doctrine bereft of any reasoned economic analysis. Thus speaks the petition: "economic analysis cannot aid a court or jury to weigh asserted interbrand gains against established intrabrand losses". Petition, p. 20. That may be sound economics and good law in the horizontal context as *Topco* teaches; but the majority below properly perceives the vertical context as significantly different. Here, both the evidence at trial[13] and the most recent commentaries[14] demonstrate the appropriateness of a rule of reason inquiry.

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[12]We respectfully add Mr. Pollock's thoughtful article to the wealth of commentaries criticizing the *Schwinn* decision, cited in the majority opinion at Pet. App. A-18, fn. 13. Throughout these proceedings Sylvania has preserved its contention that in the event its distribution practice were subject to an expanded *per se* rule of illegality derived from *Schwinn,* then *Schwinn* ought to be reconsidered. If this Court were to grant a hearing, Sylvania would urge such reexamination. In this connection see Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where,* 44 Antitrust L.J. 537 (1975).

[13]Sylvania's expert at trial, Professor Lee Preston, formerly a member of the Neal Task Force on antitrust policy under President Johnson and a consultant to the Department of Justice and Federal Trade Commission, testified that a locations restriction such as Sylvania's "has no effect on the strength of competition in the market as a whole because there are so many outlets, so many competitive alternatives throughout the market". He further testified:

> "Therefore, if this distribution policy or any particular distribution policy has the effect of strengthening Sylvania or any other smaller firm as a competitive force among the other firms in that market, many of which are larger, then I think we have to look carefully at that policy as an element in competition, indeed as a pro competitive policy among the brands and the manufacturers as a whole." See Pet. App. A-48, fn. 36.

Significantly, Continental offered no economic evidence of any kind or character during the course of trial.

[14]In addition to the articles and notes cited in the majority opinion at Pet. App. A-17, fn. 12 and A-35-6, fn. 27, see Phillips, *Schwinn Rules and the "New Economics" of Vertical Relations,* 44 Antitrust L.J. 573 (1975).

To recapitulate: the majority below correctly distinguishes the Sylvania practice from that in *Schwinn* and correctly declined to impose a *per se* rule of illegality shorn from its proper setting. Petitioners' verbal abuse of the majority opinion neither impugns its soundness nor justifies review by this Court.

II. THE OPINION BELOW DOES NOT CONFLICT WITH DECISIONS IN OTHER COURTS

With typical resort to argumentative hyperbole, petitioners assert that manufacturers and distributors participating in distribution systems throughout the country are now plagued with "confusion and doubt" as a consequence of the majority's "departure" from *Schwinn.* Petition, pp. 20-22. But the "confusion" is petitioners': for the majority opinion is consistent with every opinion of the Courts of Appeals which have considered issues of comparable character.

From *Boro Hall Corporation v. General Motors Corporation,* 124 F.2d 822 (2d Cir. 1942), *cert. denied,* 317 U.S. 695 (1943), through *Salco Corporation v. General Motors Corporation, Buick Motor Division,* 517 F.2d 567 (10th

Cir. 1975), and *Kaiser v. General Motors Corporation,* 530 F.2d 964 (3d Cir. Feb. 10, 1976), *aff'g* 396 F.Supp. 33 (E.D. Pa. 1975), the Court of Appeals have uniformly held locations practices and similar vertical distribution techniques subject to the rule of reason. The exhaustive compendium of pertinent authorities in the majority opinion below—including the remand orders in *Schwinn, Topco* and *United States v. General Motors,* 384 U.S. 127 (1966)—need not be recapitulated here. (See Pet., App.-16-44). What is incumbent, however, is a brief discussion of petitioners' treatment of three recent opinions in the Fifth, Eighth and Tenth Circuits.

(A) *Salco Corp. v. General Motors Corp.,* 517 F.2d 567 (10th Cir. 1975)

This Tenth Circuit opinion, which the court below found "virtually indistinguishable from the instant case" (Pet. App. A, p. 32) is dismissed by petitioners in terms irreconcilable with any meaningful analysis. *Salco,* we are told, holds only that

> ". . . it is lawful for a manufacturer to specify the location covered by a franchise given to a dealer. Of course it is. A manufacturer need not permit a dealer to hold itself out as the manufacturer's authorized representative at locations where the manufacturer does not wish to do so. At Sylvania's request Mr. Justice Clark instructed the jury below precisely to that effect. This case does not involve any assertion by Continental that it may hold itself out as a franchised, or authorized dealer of Sylvania at any location where Sylvania has not conferred on Continental the right to profit from Sylvania's name and good will. This case turns on a very different question—

> namely, whether a manufacturer can by agreement foreclose a retailer from shipping its own merchandise from a franchised location to a non-franchised location for resale, an issue not involved in *Salco,* but to which *Schwinn* clearly speaks. . . ." (Petition, pp. 16-17)

But the distinction thus drawn between "location franchising" and "location restrictions" is, as the majority below rather delicately put it, "highly artificial and even spurious." (Pet., App. A-30, fn.22).

Franchising by location as utilized in modern product distribution means nothing if it does not embrace the authorization to sell as a brand name dealer from a designated location. The Sylvania locations practice, like that in *Salco,*[15] was a product of agreements authorizing the dealer to sell and display products bearing the manufacturer's name. Such authorization was the primary purpose of the franchise. Indeed, it is by the dealer's sale, advertising and display of the manufacturer's line that he effectively holds himself out as an authorized dealer. See Pet. App. A-30-31, fn. 22. Continental itself recognized this truth when it requested Sylvania's formal approval of its Sacramento location as a Sylvania outlet.

Nor could it be otherwise in a merchandising world characterized by an escalating trend toward more manufacturer responsibility for the ultimate product. For the modern consumer economy demands that the manufacturer

[15]The location clause involved in *Salco* provided:
"Once dealer is established in facilities and at a location . . . mutually satisfactory to Dealer and Buick, Dealer will not move to or establish a new or different location . . . without prior written approval of Buick." 517 F.2d at 575 n.7.

assume direct responsibility for product safety and quality whether or not the manufacturer has parted with all title and dominion. For example, under California's Song-Beverly Consumer Warranty Act a manufacturer of consumer goods for which the manufacturer makes express warranties is obliged to provide sufficient service and repair facilities in the state to carry out the terms of such warranties or be liable to every retail seller of such goods who gives effect to express warranties whether or not such retailer be "franchised". See California Civil Code §1790 *et seq.*

It comes to this: in terms of the marketplace, a "location franchise" almost inevitably entails a "resale restriction" keyed to location—a restriction which springs from the notion that a manufacturer's decision to treat with a dealer in one location does not obligate it to do so in all locations.

(B) *Reed Brothers, Inc. v. Monsanto Company*, 525 F.2d 486, 500 (8th Cir. 1975), *cert. denied*, 46 L.Ed. 645 (U.S. 1976)
Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 899-901 (5th Cir. 1973)

These Eighth and Fifth Circuit decisions present variations on the traditional theme that form cannot control substance. Both hold that on the facts presented the vertical practices under scrutiny involved territorial restraints within the reach of *Schwinn*. As such, these opinions are both unexceptionable and consistent with the Ninth Circuit holding here. Indeed, these opinions exemplify the fact that when lower courts have encountered contractual

arrangements which rigidly compartmentalized territories or precluded intrabrand competition, they have applied the *Schwinn* rule. See, *e.g.*, *Adolph Coors Company v. F.T.C.*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975). It is properly otherwise where, as with Sylvania, the purposes and effects of the challenged practice are sufficiently different to warrant further economic inquiry.

CONCLUSION

The Court of Appeals below applied proper legal standards in reversing the judgment entered in the District Court. In contrast to the initial trial, a jury may now proceed to adjudicate this controversy under rule of reason instructions. The petition fails to demonstrate any error or conflict of decision warranting review by this Court. Accordingly, it should be denied.

Dated, San Francisco, California,
August 30, 1976.

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OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC, INC., and S.A.M. INDUSTRIES, INC.,
Petitioners,

VS.

GTE SYLVANIA INCORPORATED,
Respondent.

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC, INC.,
and S.A.M. INDUSTRIES, INC.,
Petitioners,

VS.

GTE SYLVANIA INCORPORATED,
Respondent.

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 537 F.2d 980 (9th Cir. 1976) and reprinted in the appendix to the petition herein. (Pet. App. 1-114)[1] The District Court wrote no opinion. It entered Findings of Fact and Conclusions of Law which are not reported, but also are reprinted in the appendix to the petition. (Pet. App. 115-129)

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[1]"Pet. App." refers to appendices to the Petition for Writ of Certiorari herein.

JURISDICTION

The Court of Appeals entered judgment on April 9, 1976. Petitioners on July 8, 1976 filed their petition for certiorari which was granted on October 18, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1) If a TV manufacturer selling direct to retail dealers restricted intrabrand competition by assigning to each dealer a territory in which alone it could resell, the arrangement would blatantly violate the *per se* rule of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

Can such a manufacturer evade the *Schwinn* rule merely by changing the form of the restraint from one forbidding dealer "A" to sell in dealer "B's" territory to one forbidding dealer "A" to resell from any store location from which it is possible to sell in the territory served by dealer "B"?

2) *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) and *United States v. Arnold, Schwinn & Co.*, supra, establish that claimed benefits to interbrand competition cannot excuse horizontal or vertical territorial restrictions which foreclose intrabrand competition.

Does the form of the territorial resale restriction in this case require the application of the rule of reason, to balance speculative benefits to interbrand competition against certain and intentional injury to intrabrand competition?

3) Even if it were assumed, contrary to *Topco* and *Schwinn*, that a judge or jury could balance speculative gains to interbrand competition against certain harm to intrabrand competition they would presumably need evidence with which to do so.

When a resale restraint eliminating intrabrand competition has been shown, should the trier of fact be compelled to speculate about a possible benefit to interbrand competition and its relative weight when the only economic evidence shows that given the present state of economic knowledge it is impossible to tell whether a restraint upon intrabrand competition has resulted in any benefit to interbrand competition?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable statutes are set out in the appendix to the petition herein. (Pet. App. 130-133)

STATEMENT OF THE CASE

PROCEEDINGS IN THE DISTRICT COURT

This is an action for treble damage and injunctive relief brought by petitioners ("Continental"), a family owned retail chain, against respondent ("Sylvania"), a TV manufacturer.[2] Starting in 1963 Sylvania

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[2]In the district court Continental pressed claims both on antitrust and on state law tort grounds against Sylvania and John P. Maguire & Co., Inc. ("Maguire"), which financed merchandise sold by Sylvania to retailers. The jury (and trial judge) found for Continental on its antitrust claim against Sylvania, found for

sold TV sets to retail dealers, including Continental, only upon their agreement that they would not resell the merchandise except at store locations approved by Sylvania. Continental complied with that arrangement for a time, but ultimately insisted on its right to sell its own merchandise where it determined, and began to resell sets from a new store in Sacramento, despite the objection of Sylvania and Handy Andy, Sylvania's protected dealer there. Sylvania, in order to enforce its resale restriction, first took a series of predatory actions and then cut Continental off as a dealer entirely, at a time when, because of a national boom in demand and a shortage of supply of color TV sets, Continental could not obtain color sets elsewhere. On evidence supporting Continental's claim the trial judge, Justice Tom Clark, denied Sylvania's request for an open-ended rule of reason instruction and gave a *per se* instruction paraphrasing *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

On special interrogatories (Pet. App. 11-12, note 6), the jury found for Continental against Sylvania and assessed Continental's damages at $591,505. Thereafter, the court made findings consistent with and fully supported by the evidence and the jury verdict on special interrogatories. The court thereupon entered judgment on the verdict for treble the amount of damages assessed and granted injunctive relief.

Maguire on all claims, and for Sylvania on the tort claims. Continental's suit was initially filed as a cross-claim in a suit filed by Maguire against Continental for sums allegedly due on Continental's floor plan financing of Sylvania's merchandise. By stipulation, Continental's cross-claim was tried first. After the verdict was entered for Continental against Sylvania on the cross-claim, the parties stipulated to a judgment for Maguire on its contract claim in an amount substantially less than Maguire had initially asserted to be due.

Because the majority opinion in the Court of Appeals states the facts as though Sylvania, rather than Continental, had prevailed on the facts, it is appropriate to summarize the evidence heard by the trial judge and jury.

1. The evidence shows that Sylvania, at the demand of its Sacramento dealer, enforced its resale restriction to stamp out intrabrand competition in Sacramento.

a. *The purpose of Sylvania's resale restriction:* In discussing Sylvania's "elbow room" program the majority below persistently resorts to sanguine phrases such as "selective distribution" (Pet. App. 4), and "franchising by location". (Pet. App. 5) Nevertheless, the essence of Sylvania's "elbow room" resale restriction was very simple. As the majority opinion states:

> "There were agreements between Sylvania and its dealers that the dealers would not move Sylvania brand merchandise to a new unapproved location for resale without the prior approval of Sylvania." (Pet. App. 5-6)

Dealers, in order to buy Sylvania TV products, committed themselves not to resell except at store locations approved by Sylvania. (French: R.T.[3] 21-22, 23-7, 43-7, 56-61, 81-2, 84-7, 116, 119-21, 136-39, 165-67,

[3] "R.T." refers to the reporter's transcript of the trial proceedings in the district court. The page numbers are the pages in the original typed transcript. All testimony cited is printed in the joint appendix to this brief with reporter's transcript pagination appropriately indicated. The names used in these citations to the record (e.g., "French") are the names of the witnesses.

170-71, 250, 290-91; Hines: R.T. 1120, 1122-27; Carroll: R.T. 466-77, 500-01A, 504-506, 511-15; Morgan: R.T. 411-12, 418-24A; Sanford: R.T. 1994-97) See also Findings of Fact Nos. 7, 8, 13. (Pet. App. 119, 120, 123)

Despite the gratuitous assertion by the Court of Appeals that Sylvania tried to avoid anticompetitive practices (Pet. App. 6), the anticompetitive purpose for the elbow room resale restriction is candidly set forth by Sylvania in its sales manual. (Ex. F, R.T. 19, pp. 1 and 2, and Ex. C, R.T. 20, p. 2) In the manual, Sylvania states that its distribution policy:

> "create[s] 'elbow room' in a *sensible territory*" (Ex. F, R.T. 19, p. 1, line 8);
>
> "give[s] SUPER 'elbow room'" (Ex. C, R.T. 20, p. 2, line 21);
>
> "gives every Sylvania dealer a *geographic area* in which to sell . . . Sylvania products by franchising dealers *by territory* . . ." (Ex. F, R.T. 19, p. 2, line 23);
>
> "*eliminates* 'same brand competition'" (Ex. F, R.T. 19, p. 2, line 15 and p. 1, line 9); and
>
> "*eliminates vicious price cutting* and establishes suggested 'go' prices . . ." (Ex. F, R.T. 19, p. 2, lines 16-18) (emphasis added throughout)

The evidence is also overwhelming that the restrictive purposes announced in the manual were carried out in the administration of the program in Northern California generally (R.T. 290-91, 475-77, 484-85, 492, 497-98, 551-53) and in Sacramento specifically, the territory involved in this case. (R.T. 437-48, 536-41,

1122-27, 1150-51) Dealers were told that "same brand" competition was to be eliminated. (R.T. 1126) Even Sylvania's most reticent witness finally admitted that its purpose was to end what he termed "cut throat" competition among dealers reselling Sylvania's products. (R.T. 645-46)

b. *The effect of Sylvania's resale restriction:* Elbow room did eliminate intrabrand competition. By reason of the inherent limitations respecting advertising and promotion, delivery and service, the sales territory of a TV dealer is limited to a radius of between 25 and 50 miles from a location from which he is authorized to sell. (R.T. 255-57, 685-86, 1174, 1450-52) See Finding of Fact No. 8. (Pet. App. 120) Although the majority below states that the elbow room policy was administered so as to place "at least two" authorized dealers in every major metropolitan market (Pet. App. 6), the overwhelming evidence is that in Northern California—and specifically in Sacramento, the only market for which detailed evidence was introduced—the program was administered in a way that was devastating to intrabrand competition. (R.T. 475-77, 484-85, 492, 497-98, 536-41, 1122-27)

In 1961 and 1962, before the elbow room policy was applied, there were in Sacramento about 19 competing Sylvania dealers. (R.T. 1111-12) Elbow room was fully introduced in 1963. (R.T. 1112-13) In that year, the number of dealers was reduced from 19 to 5. (R.T. 524-26, 1113) By the middle of 1964 the phaseout of Sylvania's old distribution system was nearly complete and the number of Sacramento firms

to which Sylvania made sales had been reduced to 3. (R.T. 526, 1114-15) One of these three firms was not a retailer at all, but a firm engaged in selling and leasing TV's and other appliances to motels. (R.T. 524-25) The second of these three firms was a small retailer which was fully phased out in 1966, and to which Sylvania sold in 1964 only $325 worth of merchandise. (R.T. 1114-15) One dealer, Handy Andy, had as a practical matter the entire volume. (R.T. 1114-19) See Finding of Fact No. 16. (Pet. App. 126) and chart opposite page 35 of this brief, entitled "Sylvania dealer structure, Sacrament market, 1962-1966."

In the teeth of this evidence, the verdict, and the trial court's findings, the majority treats this case as though competition in the retail sale of Sylvania products had survived in Sacramento. Sacramento, a market area of more than 500,000 consumers (R.T. 520, 2004-06), was at that time, on a per capita basis, the richest color TV market in California. (R.T. 520-21) Yet, elbow room restrictions gave it entirely to Handy Andy and eliminated intrabrand competition in Sylvania products either from dealers other than Handy Andy already in that territory or from dealers like Continental who wanted to enter it with new investment from outside. With an unchallenged retail market (R.T. 526-33, 1185-86), Handy Andy's sales of Sylvania TV products exceeded 1 million dollars in 1965. (R.T. 526-27, 1117-18) See Finding of Fact No. 16 (Pet. App. 126) It was this particular market, at this particular point in its development,

which Continental wanted to enter by shipping some of its Sylvania sets to a store it had opened there. (R.T. 265-69, 1532-34)

c. *Elbow room enforcement against Continental:* Again ignoring both the jury verdict and the trial judge's findings, and the overwhelming evidence, the majority opinion below states that Sylvania cut Continental's credit and terminated Continental not because Continental moved merchandise to Sacramento for resale, but because Sylvania was uneasy about Continental's credit. (Pet. App. 9-10) Though evidence of that innocent explanation of its conduct was presented by Sylvania, the jury clearly rejected it and the trial judge specifically found that "none of [Sylvania's claimed] reasons were the grounds on which Sylvania acted." Finding of Fact No. 15 (Pet. App. 124-25)[4] The reason Sylvania acted, as shown by the evidence, and found by the trial judge, is as follows:

> "I find that the action of Sylvania set out in paragraph 14, supra, was taken pursuant to the contract, combination or conspiracy alleged by Continental and was part and parcel thereof and at the instance of Sylvania's co-conspirator Handy Andy; and as a result thereof Continental was prevented from selling its Sylvania brand products in its store in Sacramento. . . ." (Finding of Fact No. 16, Pet. App. 126)

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[4]The predatory nature of Sylvania's action is clearly stated in the trial court's finding number 14. (Pet. App. 123-124)

The overwhelming evidence supporting the findings and verdict is of record and cannot be effaced. Continental, originally a small family business (R.T. 1424-39) whose rapid expansion had been encouraged by Sylvania (R.T. 70-72, 82-84, 1452-53, 1460-61, 1463-65) had become in 1964 one of Sylvania's largest and most successful dealers. (R.T. 148-49, 323-25, 891, 2682) It encountered problems only when, in 1965, it decided to display and sell some of its Sylvania products in the high-demand, non-competitive, Sacramento market. What occurred then can be summarized in sequence, as follows:

i. *Discussions about Sacramento prior to September 5, 1965:* In the spring of 1965 George Shahood, Continental's principal stockholder and manager of the chain, told Lee French, the Sylvania District Sales Manager for San Jose, that Continental was considering a store in Sacramento. (R.T. 248-51) French knew that under elbow room procedures Continental's sale there of Sylvania products required approval of the Sylvania District Sales Manager in that area, James Hines (R.T. 250); sometime thereafter French so notified Shahood. (R.T. 258-59) Following preliminary discussions between Shahood, French and Hines (R.T. 250-52, 1128-30, 1512-13), the matter was dormant until August, when Shahood told French that Continental had arranged to open a store in Sacramento in early September. (R.T. 257-58, 1531)

Disturbed, French repeatedly told Shahood this shouldn't be done without prior approval from Sylvania. (R.T. 258-59, 749-51) He complained to several Continental employees that he was "getting heat" from Batavia, Sylvania's corporate headquarters, to prevail on Continental not to enter the Sacramento market. (R.T. 751-53) At the beginning of September, shortly before the Sacramento store opened, French told Shahood once again that Sylvania sales there could not be approved. (R.T. 257-59, 1531-32)

ii. *The events of September 5, 1965:* On Sunday, September 5, 1965, the day before Labor Day, Shahood told French that Continental, despite lack of approval, had shipped some of its merchandise from its San Jose warehouse to Sacramento. (R.T. 264, 1532) French asserted that Shahood was being foolish, that he was jeopardizing Continental's entire relationship with Sylvania. (R.T. 265-69, 1532-34) Shahood urged French to try again to obtain Sylvania's permission. (R.T. 267, 1534) French thereupon telephoned Hines and told him what Continental had done. (R.T. 271-72) Hines told French that he doubted that anything could be worked out because of commitments to Handy Andy, the existing Sacramento dealer. (R.T. 272-74)

On that weekend, French also met with Calvin Savage, Continental's accountant. (R.T. 755-56) French told Savage that if Continental persisted "there won't be any more Continental TV" and Savage and other employees "will be out of a job." (R.T. 756) French said Savage was "really foolish to stick around" (R.T. 756) and, in fact arranged an employment interview for Savage with Continental's largest San Jose competitor. (R.T. 757-59)

iii. *The events of September 7, 1965 and immediately thereafter:* On the next business day, Tuesday, September 7, French called Sylvania's National Sales Manager, Ray Steiner, saying that Continental had Sylvania sets in Sacramento without approval from Hines. (R.T. 275) Steiner said he would check the matter and call French back; about two hours later Steiner did telephone French, told French that approval could not be worked out, and asked French what Continental was going to do with the merchandise. (R.T. 275-78) Immediately upon hearing from Steiner, French called Shahood. He informed Shahood that Sacramento approval was impossible (R.T. 279) and asked what Continental would do. (R.T. 1534-35)

Shahood—having talked with Continental's attorneys (R.T. 1534)—informed French that Continental had been advised that it was unlawful for Sylvania to dictate where Continental could sell and that Continental planned to keep the merchandise in Sacramento. (R.T. 279-80, 1534-35) At the time, Continental had pending two large orders for Sylvania merchandise (R.T. 237-38, 242-43) which had already been approved for credit and were waiting delivery. (R.T. 236-38, 242-43, 296, 977-78, 991-92, 1009-10, 1545) French threatened Shahood with the loss of these orders and said Continental would get nothing from Sylvania thereafter if it persisted. (R.T. 267-70, 1535-36) French then reported back to Steiner that Shahood had refused to remove his Sylvania merchandise from Sacramento. (R.T. 280-81)

Contrary to the Court of Appeals majority's statement that Sylvania acted out of concern about credit (Pet. App. 10), and consistent with the findings (Pet. App. 124-26) the record shows an attempt by Sylvania to camouflage as a credit decision what was in truth a decision by marketing executives to stop Continental from entering the Sacramento market. On September 7, the very day that Shahood told Sylvania that Continental insisted on its right to keep its merchandise in Sacramento, Hines, Sylvania's Sacramento area sales manager, informed Ken Lopolito, Sylvania's California Area Credit Supervisor, that Continental had Sylvania brand merchandise in Sacramento (R.T. 1012-13), expressed concern about Handy Andy, and demanded to know whether the Sylvania credit people could force Continental to get the merchandise out of Sacramento on the ground that it was "out of trust." (R.T. 1013-18, 1538-39; Ex. T, R.T. 1163) Lopolito informed Hines that there was no credit problem with Continental (R.T. 1017-18), but immediately thereafter called Thomas Rivers, his credit department superior at Sylvania's corporate headquarters, to report what had happened. (R.T. 1021) Rivers, upon being told what Continental had done, instructed Lopolito that Continental's previously approved and processed orders were not to be shipped. (R.T. 1021-28) The following day, Lopolito sent a wire to Rivers which clearly shows that Continental's orders were being held up not for credit reasons but because Continental had merchandise in Sacramento. The wire said:

"Please advise current situation regarding Continental TV and request for franchise (Sacramento) I have held last order pending hearing from you." (Ex. BV, R.T. 1026; R.T. 1024-26)

A day or so later Continental's Sacramento store opened for business; Hines went to the store, saw Continental's Sylvania merchandise on the floor, and demanded to know what Continental was doing with Sylvania merchandise in Sacramento, admitted that Keith Anderson of Handy Andy was "on the phone screaming to Batavia" (R.T. 431, 1538-39) and told Shahood that Continental could not have Sylvania merchandise in Sacramento. (R.T. 1538-39) Shahood would not budge; he told Hines the merchandise was for sale. (R.T. 1539)

iv. *Sylvania's reprisals for Continental's action:* Continental's decision brought prompt reprisal. Initially, French was ordered to have no further contact with Continental. (R.T. 280-82) This method—simply ceasing to call on a dealer—had on an earlier occasion been used successfully by French to confine the sales area of a dealer who, in violation of his agreement with Sylvania, had sold Sylvania merchandise in Berkeley *without Sylvania's* authority. (R.T. 283-91, 552-53) Lopolito, Sylvania's credit man in charge of California, received an identical, specific instruction: Do not talk to Continental. (R.T. 282-83, 1028-29)

After Continental's attorneys had written to Sylvania challenging the legality of Sylvania's conduct (Ex. EH, R.T. 1542-43, 1539-41A), French started contacting Continental again. (R.T. 1543) He repeat-

edly asserted that Shahood was being stupid and foolish, was jeopardizing his program with Sylvania, was jeopardizing Continental, and that he should withdraw from Sacramento. (R.T. 1543) Sylvania also refused to accept any further orders from Continental (Ex. X, R.T. 293, 291-93, 296-97), and continued to withhold shipment of Continental's July and August orders. (R.T. 977-78, 990-92, 1008-10, 1544-45, 1556) Although no credit question had previously been raised (R.T. 296, 1026-29), John Morgan—not a credit man, but Sylvania's Vice-President for Sales—instructed French—also in the sales line of command—to tell Shahood that the orders were being held for credit review. (R.T. 298, 1544) This step was taken, moreover, despite the fact that Sylvania had at the time no complaint about Continental's payment record (R.T. 981-96, 1003-08, 1018, 1509-11, 1522-24) or its credit position (Ex. BM, BN and BP, R.T. 1000; R.T. 996-1000; Ex. BR, BS and BT, R.T. 1004; R.T. 263-64, 1003-05), and despite the fact that Continental's July, August and September orders aggregating $255,500 (R.T. 388), had presented no credit difficulty. (R.T. 295-6, 977-78, 990-92, 1008-10, 1544-45) Indeed, Continental was then in the best financial condition of its history. (R.T. 1559-60; Ex. EG-1 through EG-10, R.T. 1560)[5]

[5]The Court of Appeals majority implies that Sylvania had concern about Continental's credit because Sylvania learned in 1965 that Shahood, a former Marine Officer, had a military conviction during his Korean War Service, many years before. (Pet. App. 9-10) But as the evidence showed, and Mr. Justice Clark specifically found, Shahood had himself in November 1964 voluntarily reported to Sylvania's sales and credit representatives that he had been convicted. Many months after these disclosures, but

Shortly thereafter, Lee Lockhard, Sylvania's Comptroller, notified Continental that its credit was cut from $350,000 to $50,000 (R.T. 1545-46), effectively cutting off Continental from further purchases. Lockhard also unilaterally abrogated the terms of an agreement which had been negotiated between Continental and Sylvania the previous June about how maturies were to be paid (Ex. BG, R.T. 966; R.T. 953-66, 1508-12) and instructed Maguire (which serviced Sylvania's program of floor plan financing (R.T. 1317-19, 2985-87)) that Maguire was no longer to grant Continental the 10 to 13 day clearance time for payments which Sylvania and Continental had agreed upon. (Ex. CA, R.T. 1549; R.T. 1545-49) On instructions from Sylvania, Maguire then made a demand on Continental for payment of sums asserted to be due, but demonstrably excessive.[6]

v. *Continental's resistance to the Sylvania attack and its consequences:* Faced with Sylvania's commer-

before Continental shipped merchandise to Sacramento, Sylvania increased Continental's credit line to $350,000 and solicited from Shahood a $220,000 order on credit. (Finding of Fact No. 15, Pet App. 124-125) Thus, the evidence amply supports the conclusion of the trial judge and the jury that credit concern was not the true reason Sylvania acted.

[6]See Finding of Fact No. 14. (Pet. App. 123-124) The demand was for immediate payment of $45,331.68. Maturities had been computed as of the date that merchandise had been shipped by rail from New York. (R.T. 1341) Actually Sylvania's sales manual stated that dealers were to be given four months free flooring "in the dealer's store" (Ex. G, R.T. 75; R.T. 73-75) and Continental, when it accepted the financing plan, had been so assured. (R.T. 327, 907-08, 985, 1452-55) (Indeed, Sylvania credit personnel knew that dealers were being told by Sylvania salesmen that dealers were entitled to display merchandise on their floor for 120 days before any charges began, and at some time after April, 1965, the Sylvania Area Credit Supervisor in California

cial aggression, Continental tried to defend itself. By wire and letters it put Sylvania on notice that it would not comply with the excessive payment demand, that it would not buckle under to unlawful efforts to curtail its markets, and that it stood ready to meet and negotiate. (Ex. CF, R.T. 1347; Ex. EM, R.T. 1350; Ex. EN, R.T. 1724; R.T. 1719-24) Sylvania thereupon requested Maguire to bring suit, repossess all Continental's Sylvania merchandise, attach Continental's bank accounts and (although no lien was even asserted on anything other than a portion of Continental's Sylvania inventory) cause the United States Marshals to close and padlock Continental's main store and its warehouse. (R.T. 1341-42, 1559-61)

Following repossession, Sylvania and Maguire executives convened. (R.T. 310-11) Lockhard, Sylvania's Comptroller, told all present to remember that this was Maguire action, not Sylvania action. (R.T. 311, 3255) Donald Pedlow, a Maguire executive, stated that the Marshals had been instructed by Maguire to treat Mr. Shahood as an ex-con (R.T. 312-313); in this context, the chaining and locking of three of Continental's properties was discussed. (R.T. 314-15) Pedlow re-

tried to induce Sylvania sales personnel not to pass on this information.) (R.T. 906-08) The demand was excessive also in two other respects: first, it demanded items which, under the June agreement, would not have been due for from seven to ten more days (Ex. EM, R.T. 1350; R.T. 1347-50); second, the sum demanded was computed without subtracting any but one of several off-setting credits which aggregated several thousand dollars, which were concededly due to Continental, and which Continental had been seeking for months to collect. (Ex. EM, R.T. 1350; R.T. 956-59, 987, 1005-06, 1347-50, 1724-25) Indeed, Continental was not paid these credits until, after this action was initiated, Continental brought suit in state court for collection. (R.T. 1725)

ported, moreover, that Continental's banking connections had probably been jeopardized (R.T. 315-16) and assured the group that since discounting consumer paper was the backbone of Continental's business, Continental was going to suffer. (R.T. 316)

Stressing urgency, Lockhard (in an obvious effort to injure Continental credit still further) then instructed an assistant that the Credit Manager of Philco (Sylvania's competitor, and Continental's other major supplier, which also advanced credit to Continental) should be immediately told about the actions taken against Continental that day. (R.T. 316-19) Finally, Sylvania absorbed shipping expense to sell Continental's repossessed merchandise, which had been taken from various locations throughout Northern California (R.T. 319), to Continental's largest San Jose competitor. (R.T. 319-22)

Sylvania's attack on Continental was an immense success. It came on the eve of the color TV boom (R.T. 36-38, 325-26, 454-57, 562-63, 1167-69, 1555-56, 2787-98), to which manufacturers responded by allocating sets to their existing dealers only. (R.T. 38, 454-57, 559-63, 1169-70) Continental, unable to obtain sets from other sources to replace the loss of its Sylvania allocation, was driven out of Sacramento, and forced to close down stores in Vallejo, Oakland, San Francisco, and Salinas, as well. (R.T. 1569)

2. Given the evidence reviewed above, the District Court properly gave a per se instruction based on the Schwinn rule.

In the trial court two issues were posed by the evidence and by the arguments of both parties to the

jury (R.T. 3338, 3378); first, whether Sylvania acted against Continental in reprisal for Continental's shipment of Sylvania sets to Sacramento for resale or because of credit concerns, and, second, whether Sylvania's elbow room restriction involved control over resale territories, as Continental contended, or merely a practice of franchising by location, as Sylvania asserted. It its instructions, the court told the jury that "Continental's specific claim" was that Sylvania entered into a contract, combination or conspiracy—

> *"the purpose and effect* of which was to establish and enforce a sales distribution policy restricting *the locations from which and territories in which* Sylvania dealers could resell . . ." (R.T. 3435) (emphasis added);

stated that Sylvania denied this contention (R.T. 3436); explained the general purpose of the Sherman Act (3441-42); emphasized that concerted action violates the act

> "when its purpose is, or likely effect will be to unreasonably restrain competition in the market place" (R.T. 3442);

and then accurately and fully paraphrased the language and holding of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), saying:

> "So, too, concerted action in the form of *dividing territories* in which a dealer may resell merchandise purchased from the manufacturer without resale price maintenance constitutes a violation of the antitrust laws. That is to say, where a manufacturer, by means of a contract, combination or conspiracy, *restricts the territories*

within which a dealer may resell merchandise purchased from the manufacturer, such a restriction is unlawful regardless of whether or not that restriction is good business practice from the manufacturer's point of view and is likely to assure adequate volume or profits. Any agreement, combination or conspiracy by which a manufacturer interferes with the ordinary and usual forces of competition to *restrict the territories* within which dealers may resell merchandise which they have purchased from the manufacturer or to *keep one dealer from competing for customers or sales in a territory or area served by another dealer* also constitutes a violation of the antitrust laws, whether or not the territories resulting seem reasonable or unreasonable.

"Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion or control over the products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of Section 1 of the Sherman Act, regardless of the reasonableness of the location restrictions." (R.T. 3446-47) (emphasis added)

Further, the trial judge at Sylvania's request specifically instructed that:

"On the other hand, on this question of *territorial or customer restrictions,* you are instructed that a manufacturer, such as Sylvania, has a right, acting alone and independently for its own

business interests, to select its customers, and for this purpose, the manufacturer may grant an exclusive 'franchise' to certain dealers to whom, alone, he will sell his products. Also, it is lawful for the manufacturer to designate the location or locations of the place or places of business for which said dealer or dealers are franchised. It is also lawful for the manufacturer to decline or refuse to grant a dealer's request for a franchise at different or additional locations." (R.T. 3447-48) (emphasis added) (See Sylvania Instruction No. 30C, C.T. 1269)[7]

By answers to special interrogatories propounded by the court the jury found that Sylvania's resale restriction constituted a contract, combination, or con-

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[7]By contrast, the instructions requested by Sylvania and denied by the court would have instructed (erroneously) that arrangements to confine resale areas are governed by the rule of reason and, in addition would have told the jury: that even "eliminating all competition among Sylvania dealers" could be "outweighed by benefits" (C.T. 1161); that "reducing, but not eliminating [such] competition" would "tend to show" reasonableness (C.T. 1161); that while "substantial lessening of the number of television outlets and brands available," would "tend to support a finding of unreasonable restraint" (C.T. 1162), even then "a showing that the practice was adopted to serve legitimate business purposes, and particularly to increase Sylvania's strength as a competitor" would "support a finding that Continental had not proved an unreasonable restraint" (C.T. 1163); and that "it is not enough for Continental to show simply a substantial restriction, if any there be, on competition in the sale of Sylvania television products," but that it must show "general competition in [markets] "for television products as a whole (that is to say, all brands) was unreasonably restrained." (C.T. 1272) [*Note:* The citation "C.T." refers to the district court clerk's transcript of pleadings, motions, requests and other items docketed in the proceedings. The page numbers are the pages in the clerk's transcript. All material cited from the clerk's transcript is printed in the joint appendix with the clerk's transcript pagination appropriately indicated.]

spiracy in restraint of trade in violation of the anti-trust laws and that Continental sustained $591,505 in damage to its business or property as a proximate result of that violation.

3. On Continental's claim for equitable relief the trial judge made findings of fact favorable to Continental and granted limited relief.

After the jury verdict, Mr. Justice Clark, who presided at the trial, made findings of fact and entered conclusions of law as a predicate to injunctive relief. (Pet. App. 115-29) Like the jury, the trial court specifically rejected Sylvania's factual claim that it acted against Continental for credit reasons and specifically found that Sylvania acted with the purpose and effect of keeping Continental from competing with Handy Andy in the Sacramento market. (Findings of Fact Nos. 14-16, Pet. App. 123-26)[8]

PROCEEDINGS IN THE COURT OF APPEALS

The judgment entered for Continental in the district court was affirmed, two to one, by a three-judge

[8]In footnote 7 of its opinion (Pet. App. 13) the majority of the Court of Appeals suggests the possibility that the trial court finding that Maguire sued Continental at Sylvania's request as part of the unlawful conspiracy may be inconsistent with the jury's finding that Maguire was not party to the unlawful conspiracy. No conflict exists. There was abundant evidence of conspiracy: dealers agreed to be bound by the resale restriction, and Handy Andy conspired with Sylvania to enforce the restriction by driving Continental out. Indeed, it is the latter conspiracy the trial judge explicitly found. There is nothing inconsistent or anomalous in a finding that Maguire, though not a part of the conspiracy, was told by Sylvania to sue as part of Sylvania's action to carry out the conspiracy.

panel in the Court of Appeals. Rehearing en banc was granted and the panel opinion withdrawn. A sharply divided Court of Appeals ultimately reversed the district court by a seven to four vote. The majority, in a lengthy opinion by Judge Ely (Pet. App. 1-54), held that "the legality of the locations clauses here involved should be judged under what is commonly referred to as the 'rule of reason', rather than a rule of *per se* illegality." (Pet. App. 17) The majority distinguished *Schwinn* on the ground that "Schwinn's territorial restrictions . . . prevented a dealer from competing for customers outside his territory," whereas "Sylvania's dealers could sell to customers from any area, could advertise in any area, and were limited only as to the location of the franchisee's place of business." (Pet. App. 20-21) The majority found in some lower court cases a basis for doubting whether this Court was, in *Schwinn,* "establishing a *per se* rule against all vertical territorial restraints." (Pet. App. 33) It criticized the trial judge because he "chose to apply, literally, the . . . sweeping language" of *Schwinn.* (Pet. App. 17-18) Perceiving a distinction between the restraints in *Schwinn* which restricted resale territories and those used by Sylvania which restricted the store location where resales could be made, the majority held that it was wrong to instruct in terms of *Schwinn,* despite the clear evidence and findings of a purpose and effect to exclude Continental from Handy Andy's protected Sacramento territory. The majority limited *Schwinn's* application to territorial restraints which "absolutely

prohibited a dealer from selling to purchasers outside of a certain area." (Pet. App. 24) Even on facts like those here, the *Schwinn* rule, it held, must be kept a secret from the jury. The court below therefore entered its order reversing and remanding the case for further proceedings not inconsistent with the majority opinion. (Pet. App. 53-54)

Judges Kilkenny, Browning, Duniway and Wright dissented from that disposition and opinion. Judge Kilkenney's opinion (Pet. App. 54-86), concurred in by Judges Browning and Wright and in this part by Judge Duniway, called the majority's factual distinctions from *Schwinn* "insignificant" and stated that the district court "simply took the holdings of *Schwinn* at face value and applied it to a set of facts which it logically encompasses." (Pet. App. 65) The dissenters labelled the majority's views as "impossible to reconcile with the jury verdict and the district court's findings of fact, which establish that the location clause operated as a territorial restraint." (Pet. App. 66) The dissenters read *Schwinn* to:

> "outlaw any and all territorial restrictions on resale to others. This necessarily includes all devices, the inevitable practical effect of which is to restrict a retailer's territory. We are convinced that Sylvania-type location clauses and *Schwinn*-type territorial restrictions are identical in effect and are both *per se* illegal under the command of *Schwinn*." (Pet. App. 68)

Judge Browning also wrote a telling dissent showing that major purposes of the Sherman Act

would be frustrated by the majority position. (Pet. App. 87-113) Judge Duniway wrote a brief opinion putting his dissent solely on the ground that *Schwinn* controls this case. (Pet. App. 114) Chief Judge Chambers wrote a brief opinion concurring in the judgment of the majority but dissenting from the number of words used to reach it and criticizing the majority for relying on law review comments about this very case. (Pet. App. 86-87)

SUMMARY OF ARGUMENT

1. The evidence heard by the jury and trial judge permitted only two conceivable factual conclusions: either Sylvania acted against Continental for credit reasons (as Sylvania claimed) or (as the overwhelming evidence indicated and the judge and jury found) Sylvania, at the instigation of its protected dealer, Handy Andy, enforced its resale restriction against Continental to stop Continental from shipping merchandise to Sacramento and reselling it there. On that evidence the instruction based on *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), was plainly correct. The factual distinctions attempted by the majority below between this case and *Schwinn* do not withstand analysis. The same purposes and effects can be achieved by a resale restriction in the *Schwinn* form or the Sylvania form. That conclusion is reinforced when the restrictions *Schwinn* used at the retail level are taken into account.

2. Sylvania's Sacramento conduct collides with every policy underlying the *Schwinn per se* rule. By stamping out intrabrand competition in the Sacramento territory, Sylvania freed Handy Andy both from price competition and from service and facilities competition from other Sylvania dealers. The restraint also deprived Continental of the power to make uncoerced decisions about where and to whom it would sell its own merchandise. The economic evidence submitted to the jury, and Sylvania submitted all that it desired, shows that it is impossible to tell whether conceded elimination of intrabrand competition in fact has off-setting pro-competitive interbrand effects. To submit to a jury the question whether speculative benefits to interbrand competition might outweigh these deliberate injuries to intrabrand competition would violate the holding in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). To require the jury to struggle with such a nonjusticiable issue, would enhance the risk of irrational or invidious decisions. Such a course, moreover, would substitute vagueness for reasonable certainty in an area of the law affecting all who buy and sell merchandise, and would threaten the federal courts with substantial increases in unmanageable litigation.

3. Decisions upholding exclusive dealerships and location franchises do not support the majority's result. These and like arrangements (such as primary responsibility clauses) do not stop any dealer from reselling where he chooses, or from providing intrabrand competition where the opportunity seems good.

The real significance of cases upholding exclusive dealerships, location franchises, and like arrangements, is that these cases show that all legitimate goals of a manufacturer can be met by lawful arrangements which are far less restrictive than territorial resale restraints.

4. The theory underlying the majority's decision is that economic "justifications have been offered for vertically imposed territorial restraints" which must be considered by the trier of fact. (Pet. App. 49, note 37) While recognizing that economists are in dispute about the effects of vertical territorial restraints, the majority relies on those economists whose views were rejected in *Schwinn*. None of those commentators draw a principled distinction between restraints in the *Schwinn* form and restraints in the Sylvania form. Indeed, economists on both sides of the debate about vertical resale restrictions regard resale price restraints and resale territorial restraints as essentially the same phenomenon. Thus, to accept the economic theory of the majority is not only to reject *Schwinn* but is to reject also the *per se* rule against resale price fixing, a rule unchallenged since *Dr. Miles Co. v. John D. Parke & Sons Co.*, 200 U.S. 373 (1911) and which Congress expanded when it repealed the fair trade exemption. (Public Law 94-145, December 12, 1975)

5. The majority's economic theory is at war with the concept embodied in the Sherman Act. That Act rejects the manufacturer's vision of an "orderly" resale market in which the manufacturer makes all

decisions about the prices at which, places at which and persons to whom a dealer may resell. The Sherman Act insists that resources be allocated by the interacting decisions of numerous buyers and numerous sellers in a competitive market. This requirement applies to retail trade as much as to any other segment of the economy.

6. Sylvania is not entitled to a "failing company" defense. Sylvania, a wholly owned subsidiary of General Telephone & Electronics (and now a division of G.T.E. Sylvania) was neither weak financially nor failing in its TV business in 1962 when it instituted restrictions on its dealer's resale areas. Sylvania introduced no credible evidence that it was necessary to impose such resale restraints in order to remain in business in competition with other manufacturers. Sylvania's only "justification" evidence—that it was dissatisfied with its market share in early 1962—was inadequate as a matter of law, as was its proposed instruction based thereon. There was no evidence that Sylvania even attempted to utilize less restrictive lawful alternatives. To the contrary, Sylvania concededly continued to use the same dealer resale restrictions long after its profits had more than trebled.

7. Nor can Sylvania, in imposing dealer resale restrictions, claim to have relied to its detriment on a "clearly declared judicial doctrine" that was thereafter reversed. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). No judicial doctrine existed in 1962, or at any other time, immunizing vertically imposed resale restrictions from

the application of the antitrust laws. To the contrary, the history of antitrust development in this area beginning as early as 1948 clearly indicated that *per se* illegality would likely be visited on a manufacturer which enforced dealer restrictions on resale areas or customers. Further, Sylvania did not in fact rely on any supposed legal doctrine of "lawfulness" in administering such dealer restrictions. Not only did Sylvania fail to present any evidence of such reliance, it admittedly continued to enforce such dealer resale restrictions for many years after the *Schwinn* doctrine was announced by this Court.

ARGUMENT

I. AS ENFORCED IN SACRAMENTO, SYLVANIA'S ELBOW ROOM POLICY WAS A CLEAR VIOLATION OF THE SCHWINN PER SE RULE. THEREFORE, THE INSTRUCTION GIVEN WAS CORRECT.

A. The Trivial Distinctions in Form Between the Way Sylvania Stamped Out Intrabrand Competition in Sacramento and the Way Schwinn Achieved its Similar Purpose Should Not Enable Sylvania to Evade the Schwinn Per Se Rule.

On the evidence that Sylvania's elbow room resale restriction was deliberately used to stamp out intrabrand competition in Sacramento, the trial judge instructed in terms of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 65 (1967). That instruction was plainly correct. *Schwinn* declares:

> "Under the Sherman Act it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted

> with dominion over it. . . . Such restraints are so obviously destructive of competition that their mere existence is enough." (388 U.S. at 379)

Nothing in this Court's holding or language remotely suggests that the rule thus announced is a mere matter of form. Cf. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) This Court approached the question whether vertical restrictions on resale areas were *per se* unlawful with care and deliberation. The issue was first considered in *White Motor Co. v. United States*, 372 U.S. 253 (1963), following a long period during which the government had been successfully enjoining such restraints in case after case by consent decree.[9] In *White Motor* the Court left open whether or not a *per se* rule ought to govern.[10] Four years later, after wide ranging argument, and over pointed dissent, the issue was decided in *Schwinn*. If *stare decisis* means anything, the rule there announced cannot be evaded by a simple manipulation that imposes a resale restriction on store locations when the purpose and effect is to keep one dealer from selling in the same territory as another. Other courts of appeal have, of course, viewed the *Schwinn* rule as one of substance

[9]Apparently the first of those decrees was that entered in *United States v. Libby Owens Ford Glass Co.*, 1948-49 CCH Trade Cases ¶ 62,323 (N.D. Ohio 1948). Sixteen or more such decrees were entered between 1948 and 1963. See Stewart *Franchise or Protected Territory Distribution*, 8 Antitrust Bull. 447, 470 n.51 (1963).

[10]On remand, the defendant in *White Motor* signed without trial the form of consent decree forbidding resale area restrictions to which numerous other defendants had previously agreed. See *United States v. White Motor Co.*, 1964 CCH Trade Cases ¶ 71,195 (N.D. Ohio 1964).

to be invoked, whenever, in reason, it is applicable. E.g., *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 899-901 (5th Cir. 1973); *Reed Brothers, Inc. v. Monsanto Company*, 525 F.2d 486, 500 (8th Cir. 1975), *cert. denied*, 46 L.Ed.2d 645 (U.S. S.Ct., 1976); *Copper Liquor Inc. v. Adolph Coors Co.*, 506 F.2d 934, *rehearing denied*, 509 F.2d 758 (5th Cir. 1975); *United States v. Glaxo Group Ltd.*, 302 F.Supp. 1 (D.D.C. 1969), rev'd on other grounds, 410 U.S. 52 (1973); *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621, 622 (2nd Cir. 1969); *Eastex Aviation, Inc. v. The Sperry & Hutchinson Co.*, 522 F.2d 1299 (5th Cir. 1975).

The majority below purported to distinguish *Schwinn* by saying that a territorial restraint in the form used in *Schwinn* keeps each protected reseller "absolutely isolated from all [same brand] competition," whereas a restraint in the form used by Sylvania allows each dealer to reach customers outside his assigned market. (Pet. App. 21) This assertion is demonstrably false. A restriction in either the *Schwinn* or the Sylvania form can be used to stifle intrabrand competition completely, as Sylvania in fact did in Sacramento. If, for example, a manufacturer wants one of its dealers to sell only in Washington, D.C. and another to sell only in Baltimore, it can achieve that goal either with the *Schwinn* form of restraint or with the Sylvania form. Assigning a Baltimore territory to one dealer and a Washington territory to the other is the *Schwinn* way to do it; assigning a Baltimore store location to one dealer and a Washington store location to the other is the

Sylvania method. In both instances there is a wholly theoretical possibility for the dealer in one of the markets to reach customers in the other market by newspaper advertising within the other territory, phone calls to potential customers there, and the like. But in neither instance is there any realistic opportunity for either dealer to compete with the other.

Nor can Sylvania's conduct in Sacramento be distinguished from *Schwinn* on the ground that in markets other than Sacramento Sylvania may have tolerated more than one dealer. For that matter, if a manufacturer were permitted, contrary to *Schwinn,* to substitute its judgment for that of the market, the manufacturer could use either the *Schwinn* or the Sylvania form of restraint to manage resale competition at whatever level it elected. If it wanted two dealers in Washington, D.C., for example, it could assign to one the territory east of 12th Street and to the other the territory west of 12th Street; that is the *Schwinn* form of restraint. Alternatively, it could approve for one dealer a store location east of 12th Street and for the other a store location west of 12th Street; that uses the Sylvania form to achieve the same result. The vice in what *Schwinn* and Sylvania did is not in the form, but in the fact that the manufacturer's hand, rather than the unseen hand of the market, is at the competition throttle.

The whimsy involved in the distinction drawn by the majority below is demonstrated further when another aspect of the *Schwinn* case is considered. *Schwinn* involved two tiers of distribution. At the

wholesale level distributors (who sold Schwinn bikes to retailers) were assigned designated territories. But this was not the only restraint. This Court also struck down two related resale restrictions, one of which prevented distributors (even within their territories) from selling to retailers other than those whom *Schwinn* had "franchised only as to a designated location or locations" (338 U.S. at 370), and the other of which prevented retailers (who were franchised only at specified locations) from reselling except at retail (or to another franchised retailer). Thus, retailers in *Schwinn* were not given territories set off by metes and bounds. The retail restrictions held invalid there confined retailers in essentially the same manner as do Sylvania's elbow room restrictions here. The majority's statement that "Schwinn prevented a dealer from competing for customers outside his territory" while a Sylvania dealer could "sell to customers from any area, [and] could advertise in any area" (Pet. App. 20-21) simply misreads the *Schwinn* facts and ignores the evidence, verdict and findings in this case. Schwinn retailers (like Sylvania's) were simply told the locations from which they could conduct business. They, like Continental, were theoretically free to sell to any customer anywhere. so long as they did not sell through unfranchised outlets; and, Continental, like *Schwinn* dealers, had *only* theoretical freedom to do so. Neither could transcend the inherent limits of their store locations.

Picture, for example, a Schwinn retail dealer franchised for a location in San Francisco; such a dealer

would *not* violate *Schwinn's* restrictions if he advertised in Sacramento, took phone orders from there, or otherwise succeeded in exercising his theoretical right to make sales to customers there. His position would be like that of Continental under Sylvania's elbow room restriction. Both, while actually confined to a radius around a San Francisco store, would have a theoretical right to sell to customers in Sacramento, Chicago or anywhere else. Because putting retailers under wraps in this manner dampens intrabrand competition, as did the alternative form of restraint on wholesalers, this Court in *Schwinn* ordered the decree extended:

> "The principle is, of course, equally applicable to retailers, and the decree should similarly enjoin the making of any sales to retailers upon any condition, agreement, or understanding limiting the retailer's freedom as to where and to whom it will resell the products." (388 U.S. at 378)

This language can mean only one thing: retailers, like wholesalers, must be left free to compete.

In finding a distinction where none of substance exists the majority below proceeded as though the vice in the *Schwinn* resale restriction was in its form. But as demonstrated, the difference in the form is scarcely worth mentioning, let alone sufficient to form the basis of a crucial Sherman Act distinction. The real vice of a restraint on resale areas lies in its purpose and effect. In any form, such a restraint replaces the numerous judgments properly reserved to merchants, allowing the manufacturer to preempt for itself the

SYLVANIA DEALER STRUCTURE
SACRAMENTO MARKET
1962-1966

DEALERS	1962	1963	1964	1965	1966	1967
Handy Andy		$96,615	$245,619	$838,505		
J. W. Brewer		58,502	34,467[1/]	11,290[3/]		
Tri-State Sales			535[2/]	327[4/]		
N. Amer. Appliance		6,417				
N. Sacramento TV		1,623				
Sacramento Employ. Enterprise						
Raley's Drug Center						
Petzwal's						
A & A Key Builders & Supp.						
Statewide Appliances						
Market Radio Store						
Bob's Appliance Sales						
Hery's TV						
Empire TV						
Genco TV						
Payless Factory TV						
Ulmer's TV Service						
Bomah Sales Co.						
Joseph's Radio & TV						

1/Entire Purchase Shipped to Brewer's non-Sacramento stores; no part of the shipment was resold within the Sacramento market.
2/Only one color set purchased.
3/One color set purchased; total shipment resold outside the Sacramento market.
4/No color sets purchased.

[Source: Ex. FX, R.T. 1925-26]

merchant's right to decide where and how he will sell his merchandise. Thus, the *Schwinn* rule surely applies in full vigor where, as in Sacramento, Sylvania enforced its restraint on resale areas to stamp out intrabrand competition entirely.

Other factual distinctions discerned by the majority below are no more availing. Its statement that Sylvania had at least two dealers in each metropolitan market (Pet. App. 6) is factually wrong as to Sacramento[11] and, in any event, does not distinguish *Schwinn;* the defendant there also franchised by location at the retail level (388 U.S. at 370) and no doubt authorized two or more retailers in many metropolitan areas. The majority's statement that no Sylvania dealer had a veto right over the grant of a location to another dealer (Pet. App. 46) is obviously wrong; Sylvania denied Continental a Sacramento location on the demand of its protected dealer, Handy Andy. (Finding of Fact No. 16, Pet. App. 126) Its assertion that *Schwinn* restricted vendees while Sylvania restricted vendors is also fallacious and irrelevant. Whatever the differences in form (and at the retail level even these virtually vanish), both Schwinn and Sylvania effectively restricted their buyers as to where and to whom they could resell.

The last factual distinction relied on by the majority is that Sylvania had a smaller market share than

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[11]Handy Andy, Sylvania's protected dealer in Sacramento, had virtually the entire Sylvania market in 1964 and thereafter. See the chart opposite, entitled "Sylvania Dealer Structure, Sacramento Market, 1962-1966".

Schwinn. But this distinction ignores that the *Schwinn* case announces a *per se* rule. One of the purposes of that rule is to make it unnecessary to evaluate and assess structural and other economic evidence before striking down a blatantly anticompetitive practice. Despite minor differences, the justification pressed by both Schwinn and Sylvania is essentially the same — that the resale restrictions may help a small firm compete against large ones. This Court rejected that justification in *Schwinn:*

> "Schwinn contends, however, and the trial court found, that the reasons which induced it to adopt the challenged distribution program were to enable it and the small, independent merchants that made up its chain of distribution to compete more effectively in the market place. Schwinn sought a better way of distributing its product: a method which would promote sales, increase stability of its distributor and dealer outlets, and augment profits. But this argument, appealing as it is, is not enough to avoid the Sherman Act proscription; . . ." (388 U.S. at 374-375)

That rejected argument, moreover, comes in better grace from Schwinn than it does from Sylvania, for Sylvania hardly qualifies for any list of small firms.[12]

[12]The elbow room restrictions were initiated in 1962. It was stipulated that Sylvania profits from all operations ran in excess of $24 million in 1960, $8½ million in 1961, $17 million in 1962, $40 million in 1965, and $84 million in 1966. (R.T. 2614-17) The doubling of profits between 1965 and 1966 was due, in substantial degree, to increased demand for color TV. (R.T. 2616-17)

B. The Policies Supporting the Schwinn Per Se Rule Are Fully Applicable Here.

Not only are the *Schwinn* restraints indistinguishable on the salient facts from those Sylvania used in Sacramento, it is also clear that Sylvania's Sacramento adventure ran roughshod over every policy the *Schwinn* rule is intended to advance. The primary reason for *Schwinn's per se* prohibition is that when a manufacturer confines resale areas it deprives the public of the benefits of intrabrand competition. As in Sacramento, customers for the brand are limited to a single source. In an age of product differentiation and massive advertising of consumer goods — where each brand seeks to attract its own following, to become, as it were, a market in and of itself — the resulting harm to competition can be severe. A half million Sacramento buyers, who were spending a million dollars a year on Sylvania merchandise, had only one dealer to whom they could turn. These buyers lost the advantage of intrabrand price competition just as surely as if Sylvania had fixed resale prices in violation of the rule in *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911). Though Sylvania did not use a *Dr. Miles* type of restriction, by keeping all dealers save one out of Sacramento it achieved the same effect. There can be no intrabrand price competition in a market where only one dealer can sell the brand.

Furthermore, a restriction confining resale areas can be far worse than a resale price restriction. Harmful though it would be, a resale price restriction

would not have precluded other Sylvania dealers from entering Sacramento. Though no price competition would occur, buyers would at least have gotten the benefit of competition in the form of better service and facilities (so-called "enterprise competition"). By contrast, the way Sylvania applied its elbow room restriction dealers other than Handy Andy were kept out of Sacramento entirely. Sacramento consumers lost the benefit of both price and "enterprise competition". Consumers not only paid whatever price Handy Andy (free of the competitive spur from any other Sylvania dealer) decided to charge, they got whatever level of service and amenity Handy Andy (free of the competitive spur from any other Sylvania dealer) decided to provide to them. These effects are most harmful, no doubt, where, as here, the impetus for enforcement against one dealer comes from another dealer. *White Motor Co. v. United States,* 372 U.S. 253, 267 (1963) (Justice Brennan concurring). But as *Schwinn* holds and *Dr. Miles* implies, enforcement of such restrictions foreclose resale competition even where the manufacturer takes the initiative.

Assuring to buyers the benefits of a competitive market is not the only goal of the *Schwinn* rule. An important social goal of the Sherman Act is also embodied in *Schwinn.* Independent small businessmen who have made an investment of capital, energy and hope in their own enterprises, ought to be able to make their own crucial decisions as to where to sell and what price to charge for their own merchandise, free of coercion, collusion and exclusionary practices.

That is what the free enterprise system, which the Sherman Act protects, is basically about. This Court has consistently supported that goal of commercial freedom. *United States v. A. Schrader's Son, Inc.,* 252 U.S. 85, 100 (1920); *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4-5 (1958); *Brown Shoe Co. v. United States,* 370 U.S. 294, 344 (1962); *Simpson v. Union Oil Co.,* 377 U.S. 13, 19 (1964). Sylvania, in Sacramento, displayed consummate contempt for this Sherman Act goal. If Sylvania's Sacramento conduct does not invoke the *per se* rule of *Schwinn,* neither Sylvania nor any other large firm need in the future doubt its ability to effectively throttle any small buyer with which it deals.

Furthermore, to apply the rule of reason to a case where the manufacturer stamped out same-brand competition would undercut this Court's settled view about the alternative roles of the courts and the legislature in antitrust administration. The interests which this Court has evinced when it has addressed these matters are related to the purpose and effect of the restraint, not to its mere form. A *per se* rule, ". . . avoids the necessity for an incredibly complicated and prolonged economic investigation . . . —an inquiry so often wholly fruitless when undertaken." *Northern Pacific Railway v. United States,* 356 U.S. 1, 5 (1958). As this Court recently held in *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972), where, as here, a restraint has been imposed on intrabrand competition, the Court should not set sail on a sea of speculation in a prophetic effort to tell

whether the resulting injury is offset by asserted benefits to interbrand competition:

> "Our inability to weigh in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules . . ." (405 U.S. at 609-610) . . .
>
> ". . . If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this . . . is a decision that must be made by Congress and not by private forces or by the courts." (405 U.S. at 611).

The majority tries to distinguish *Topco,* saying it stands only for a truism—that the rule of reason does not apply to allow proof of benefits in another market once a *per se* violation is clearly established. (Pet. App. 29, note 21) But the very question this Court addressed in *Topco* was whether or not a *per se* rule did apply to the restraint imposed by *Topco.* The language quoted above gives "one important reason" for holding the *per se* rule applicable, and, of course, it is equally applicable here. See also *United States v. Philadelphia National Bank,* 374 U.S. 321, 371 (1963).

Congress has already shown that it can deal with issues that *Topco* assigns to it. In the last Congress both branches considered bills granting an antitrust exemption for territorial arrangements in the soft drink industry. See H.R. 6084, S. 3421, and Senate Report No. 94-1195. (August 31, 1976) These bills, which carved out limited exceptions to rules an-

nounced by this Court, failed of passage. By contrast, Congress recently enacted legislation abolishing the fair trade resale price fixing exemption (Public Law 94-145, December 12, 1975) and passed the Hart-Scott-Rodino Antitrust Improvements Act of 1976. (Public Law 94-435, September 30, 1976) Far from being disposed to relax the rules against vertical restraints, Congress seems intent on strengthening antitrust enforcement in such area.

Finally, the *per se* rule of *Schwinn* has important collateral advantages. There are about half a million franchised businesses in this country.[13] Attorneys advising these firms ought to be able to tell them which restraints are lawful and which are not, without engaging economists to do elaborate rule of reason analyses of an entire industry—elaborate exercises, which, in the end, would leave the matter in serious doubt. Moreover, the potential for dispute would be enormous if the question of legality were unclear. If even a small percentage of these myriad arrangements have to be litigated under an open ended rule of reason, the federal courts could be inundated. There are many less restrictive ways in which a manufacturer may protect its own business interests by contract with dealers. (See part II, *infra*) Thus far, clear, bright lines have been drawn between those restraints which are unlawful and those which are not. Restraints on resale areas, customers and prices, which harm the

[13] In 1972 the figure, by one count, was 445,281. United States Department of Commerce, Franchising in the Economy 1972-1974 (1974).

consumer and seriously inhibit dealer freedom are unlawful. Less restrictive arrangements, such as exclusive distributorships, location franchises, and other arrangements discussed in Part II, *infra*, are lawful unless used to achieve anticompetitive ends. These settled distinctions between what is presumptively lawful and what is *per se* unlawful in distribution arrangements strike an appropriate balance between the interests of manufacturers and those of their dealers. Only these settled distinctions can provide the certainty needed in commercial matters, reduce the private and public costs of excessive disputes and complex litigation, and reduce the risk that jurors, facing unfathomable economic complexity, will respond to manufacturer-dealer litigation on emotional or invidious grounds.

II. CASES UPHOLDING EXCLUSIVE DEALERSHIPS, LOCATION CLAUSES AND COMPARABLE ARRANGEMENTS INVOLVING NO RESALE RESTRICTIONS DO NOT IMPLY THAT A MANUFACTURER MAY FORBID ONE DEALER FROM SHIPPING HIS MERCHANDISE INTO ANOTHER DEALER'S AREA FOR RESALE.

The majority below relied heavily on the numerous cases upholding the legality of exclusive dealerships. (Pet. App. 37-44)[14] Reasoning from cases like *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396

[14]The exclusive dealership cases are not directly involved here. Sylvania makes a point of the fact that it gave no exclusives. (R.T. 182-83, 423, 646-47, 2522, 2550, 2595-96) Furthermore, Justice Clark instructed that Sylvania could lawfully grant exclusive franchises. (R.T. 3447-48)

U.S. 1062, rehearing denied, 397 U.S. 1003 (1970), the majority makes two arguments: (1) that Sylvania's resale restriction has the same market effect as exclusive dealerships, which are lawful, and thus ought to be lawful too (Pet. App. 37); and (2) that resale restrictions like those Sylvania uses may be necessary to make exclusive dealerships effective, and therefore should be lawful. (Pet. App. 38-43)

The syllogism in the first argument is flawed. There is a vast difference between the market impact of a resale restriction which keeps one dealer from selling in another's area and the market impact of an exclusive dealership. By such a resale restriction the manufacturer keeps the dealer out of areas other than where it wants him—the manufacturer, all the while, remaining free to sell to any other dealer anywhere. Without the investment and risk of forward integration, the manufacturer appropriates control over one of the most crucial competitive decisions any truly independent trader must make—where he will sell his wares. (Pet. App. 77, Kilkenny, J. dissenting) In an exclusive dealership, by contrast, the restriction is not on the dealer, but on the manufacturer. In order to induce the dealer to handle his product the manufacturer gives assurance that the *manufacturer* will not, in the dealer's area, sell to others. See Rifkind, *Division of Territories*, in Van Cise and Dunn, *How to Comply With The Antitrust Laws*, 127, 134-35 (1954).

The second type of arrangement (where the manufacturer limits himself) is valid if reasonable. *Seagram & Sons, Inc. v. Hawaiian Oke Liquors*, 416

F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062, rehearing denied, 397 U.S. 1003 (1970) The first type of arrangement (where the manufacturer restricts the dealer and thereby exercises control at two levels of distribution), far from being similar to the first, is "at the other extreme" from it. This Court in *Schwinn,* upon holding invalid *per se* a restraint on the dealer, distinguished exclusive dealerships in just those terms:

> "At the other extreme, a manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods. . . . If the restraint stops at that point—if nothing more is involved than vertical *'confinement' of the manufacturer's own* sales . . . [it] would not violate the Sherman Act." (388 U.S. at 376 (emphasis added)

It is only by denying this contrast between resale restrictions (which, as in *Schwinn,* put the dealer under wraps) and exclusive dealerships (which confine only the manufacturer's own sales) that the majority below can find aid in the long list of exclusive dealership cases it cites.

The second "exclusives" argument made by the majority (Pet. App. 38-43) is weaker still. The premise is that when a manufacturer does limit his own sales by granting exclusive dealerships (as Sylvania did not) he must be allowed to confine dealer resale areas in order to keep each dealer out of the exclusive territory of others. *Schwinn,* of course, commands otherwise. The *Schwinn per se* rule gets priority over

the "valid if reasonable rule" applied to exclusives; a manufacturer may respect the exclusive he has granted by refusing to sell to a dealer except in that dealer's territory, but after delivery of title to merchandise to such dealer within his territory the manufacturer cannot forbid the dealer to ship it elsewhere for resale. Cf. *Interphoto Corp. v. Minolta Corp.,* 417 F.2d 621 (2d Cir. 1969); *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 900 (5th Cir. 1973). This, indeed, is essential; otherwise the rule about exclusives would destroy the *Schwinn per se* rule.

But even if the majority's contrary legal premise were right, its reasoning would on this record not support its result. As the majority itself notes (Pet. App. 6), and as the record demonstrates, Sylvania granted no exclusive dealerships. (R.T. 182-83, 423, 646-47, 2522, 2550, 2595-96) The concept the majority below presses is an ancillary one. Compare *United States v. Addyston Pipe & Steel Co.,* 85 F. 271 (6th Cir. 1898), aff'd 175 U.S. 211 (1899). The majority urges that a territorial resale restraint, though *per se* unlawful, becomes valid where used in aid of an otherwise valid exclusive dealership. Even giving the argument full scope, the invalid resale restraint surely does not become valid when, as here, it *is being used alone* and for its own sake. To hold otherwise is like arguing from the fact that a trader selling his business may grant a covenant not to compete to the conclusion that the same covenant could be given where he is not selling his business. The majority's

ancillary argument is an appendage in the air, with no base to support it. To credit the contention would be to reject *Schwinn* entirely.

The majority below also cites the *Schwinn* and *Topco* orders on remand which, while explicitly forbidding resale restraints, authorize location franchises. As Judge Kilkenny's analysis shows (Pet. App. 70-74), to read those decrees the way the majority does would in each instance be to view the exception in the decree as swallowing up the basic prohibition of the decree. It would also require the view that the District Court on remand had exercised the prerogative to ignore the opinion and mandate of this Court. Those decrees allow the designation of franchised locations to which the manufacturer will ship; they explicitly forbid restrictions on where the buyer may resell. Similarly the majority cites cases like *Kaiser v. General Motors Corporation,* 530 F.2d 964 (3d Cir. 1976), aff'g 396 F.Supp. 33 (E.D. Pa. 1975) and *Salco Corporation v. General Motors Corporation,* 517 F.2d 567 (10th Cir. 1975), which upheld the practice of franchising by location on records which, unlike this one, were devoid of suggestion that the manufacturer also obtained and enforced promises by dealers that they would not ship merchandise for resale to locations where they were not franchised. That General Motors may lawfully refuse to allow a dealer to change the location of a franchised dealership, the location where the dealer is authorized to hold himself out as the authorized GM dealer and service unit, does not imply that

General Motors can also restrict such dealer from shipping automobiles to a non-franchised location for resale. Cf. *United States v. General Motors Corp.,* 384 U.S. 127 (1966).

A restriction concerning the location where a dealer may trade on the manufacturer's good will is far less restrictive than one which limits where the dealer can resell his own merchandise. A firm with a trademark associated with a particular service—say, Howard Johnson or Chicken Delight—may authorize a franchisee to engage in business under the franchisor's name and mark at a specified location. The franchisor, having a property right in its name and mark, has an obvious interest in how and where they are to be used. Continental, to the contrary, never claimed a right to operate under Sylvania's name or mark in Sacramento. All dealers buying from Sylvania specifically agreed in their "franchise agreement" not to do business under Sylvania's name and each was expressly "under no circumstances [to] be deemed agents or representatives of Sylvania". (Ex. 3; R.T. 1) All a Sylvania dealer was "franchised" to do was to sell under *its own name* and for its own account. Moreover, as he did in respect of exclusive dealerships, Justice Clark specifically instructed the jury that it is lawful for the manufacturer to designate the location for which a dealer is franchised and to decline to grant franchises for different or additional locations. (R.T. 3447-48) The only thing he told the jury Sylvania could not do was restrict where resales were made. (R.T. 3446-48)

The real significance of the permissive case law and decrees about exclusive dealerships and location clauses is that they dramatize the large number and variety of arrangements, all less restrictive than resale restraints, which a manufacturer may lawfully use to achieve any reasonable goal for its distribution system. A manufacturer may use saturation distribution if it chooses; or, to induce particular dealers to handle its products it may grant exclusive dealerships or grant location franchises, or both. The manufacturer may also use a location franchise to protect its good will, and its property rights in its name and mark. A manufacturer can also assure itself of adequate promotion in any area by a "primary responsibility" clause (like that authorized in the *Schwinn* order on remand and in numerous consent decrees like those referred to in footnote 9, supra.)[15] The manufacturer may also adopt specifications about store size, display or service facilities, or the like and can require the dealer to do specified levels of advertising or to meet designated sales quotas. There is no rule against any of these things. Certainly, a manufacturer has a wide range of lawful ways to induce dealers to handle its product and to affect its marketing style. If anything, the manufacturer's interests have been more fully responded to, under present

[15]These clauses assign to a particular dealer the primary responsibility for developing business in a designated area and may require the dealer to give his best effort to do so. Dealers, however, are not forbidden to sell elsewhere. See the concurring opinion of Justice Brennan in *White Motors Co. v. United States,* 372 U.S. 253, 271-272, n. 12 (1963). See also Judge Kilkenny's opinion below. (Pet. App. 81, n. 8)

law, than have the social interests in dealer independence and competition. Schildkraut, *Areas of Primary Responsibility and Other Territorial Restraints In Channels Of Distribution Under The Antitrust Laws: A Legal and Economic Analysis,* 11 Colum. J. of Law and Soc. Prob. 509 (1975). The only things the courts have held that the manufacturer may not lawfully do is specify the prices at which, the areas in which, and the persons to whom a dealer may resell. In Sacramento, Sylvania crossed the clear line between what is lawful and what is not. Compare *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 900 (5th Cir. 1973); *Reed Brothers, Inc. v. Monsanto Company,* 525 F.2d 486 (8th Cir. 1975), *cert. denied,* 46 L.Ed. 645 (U.S. S.Ct. 1976).

III. DENYING A MANUFACTURER THE POWER TO RESTRICT INTRABRAND COMPETITION WILL NOT ADVERSELY AFFECT CONSUMER WELFARE OR RESOURCE ALLOCATION.

The reason the majority below strained to distinguish *Schwinn* was its conviction that forbidding a manufacturer any way to restrict resale competition "would seriously undermine" interbrand competition and hurt resource allocations. (Pet. App. 16-17) The opinion candidly displays that the majority's real quarrel is with *Schwinn* itself — and, for that matter, with *Dr. Miles,* and every case from this or any other court holding a vertical restraint unlawful. While conceding a "sharp divergence of opinion" among economists (Pet. App. 52, note 40), the majority came

down on the side of those who think that vertical resale restrictions may aid interbrand competition and that whether they do or not is a question of fact. (Pet. App. 45-53) Thus, the opinion states that a "number of justifications have been offered for vertically imposed *territorial* restraints" and says that while it expresses "no view as to the validity of these justifications," that "under the rule of reason the ultimate question must be answered by the trier of fact." (Pet. App. 49, note 37) (emphasis added) In support of this position the majority cites: law review commentaries critical of *Schwinn* (Pet. App. 18, note 13); an article by Professor Bork which suggests that antitrust rules should not forbid vertical price or vertical territorial restraints (Pet. App. 49, note 37); an article by Mr. Robinson and several case notes which attack *Schwinn* itself, and conclude that the withdrawn opinion in this case was wrong (Pet. App. 17, note 12); and an article and some of the testimony by Professor Lee E. Preston, Jr., the economist who testified for Sylvania at the trial. (Pet. App. 46, note 35; Pet. App. 48, note 36)

The *first* salient thing about the majority's economic theory is that it draws no distinction between vertical price restrictions, vertical restraints on resale areas in the *Schwinn* form or vertical restraints on resale areas in the Sylvania form. If the economic view embraced below is accepted as the Sherman Act standard, then this Court's decisions in *Schwinn* and in *Dr. Miles* are just as wrong as was the decision by the trial judge in this case. A major article relied

on by the majority (Pet. App. 50, end of note 37) was Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 75 Yale L. J. 373 (1966). It will serve as an example. Far from distinguishing between vertical resale restraints in the *Schwinn* form and those in the Sylvania form, the Bork article contends that all vertical restraints by any firm of any size which either fix resale prices or divide resale markets should be lawful; the author regards all forms of vertical market division and vertical price fixing as essentially the same phenomenon, none of them being of antitrust concern. Id. at 75 Yale L. J. 391, 397-429.[16] For this Court to accept that view would be to reject *Dr. Miles* and every vertical case after *Dr. Miles.* This Court would also have to ignore the recent Congressional decision that all resale price fixing arrangements ought to be sub-

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[16]The one thing that Professor Bork and economists who insist on the harmfulness of vertical restraints agree upon is that resale price fixing and resale area restraints have essentially the same purpose and effect. Compare: Comanor, *Vertical Territorial and Customer Restrictions: White Motor and its Aftermath,* 81 Harv. L. Rev. 1419 (1968); Stone, *Closed Territorial Distribution: An Open Question Under the Sherman Act,* 30 U. Chi. L. Rev. 286 (1963); Zimmerman, *Distribution Restrictions After Sealy and Schwinn,* 12 Antitrust Bull. 1181 (1967).

It is notable that the part of the Bork article specifically cited below (75 Yale L. J. at 430-453) deals, not with vertical restraints (which are treated earlier), but with the claimed efficiencies of horizontal market divisions. But even here Professor Bork draws no distinction between market division achieved through territorial division, store location agreements, or customer restrictions. Moreover, when Professor Bork goes on to discuss horizontal price restraints (Id. at 75 Yale L. J. 453-465), he not only finds the same kinds of potential efficiencies as in the case of market division, but he explicitly states: "Price fixing and market division are, of course, the same general economic phenomenon." (Id. at 75 Yale L. J. 453)

ject to Section 1 of the Sherman Act. (Public Law 94-145, December 12, 1975). The other articles cited by the majority are much the same. Not one of them proposes a basis in principle or in economic theory for distinguishing between one form of resale area restraint and another. Not one of them, then, provides a basis in principle for distinguishing between this case and either *Dr. Miles* or *Schwinn.*

The *second* salient thing about the majority's economics is that it requires a jury inquiry into issues this Court has held are no proper part of the judicial function. *United States v. Topco Associates,* 405 U.S. 596 (1972).

The *third* matter of note concerning the majority's economics is that even were it sound in principle it would have no proper function in this case. If a jury were ever to be asked to consider whether conceded injury to intrabrand competition achieved offsetting gains for interbrand competition, it ought only to be on credible evidence supporting such a contention. Otherwise, the jury on a rule of reason instruction would have license to speculate. Here, all economic evidence Sylvania wished to present went into the record. Only after hearing it did Justice Clark deny the rule of reason instruction. Cf. *White Motor Co. v. United States,* 372 U.S. 253 (1963). The only economic evidence Sylvania offered was the testimony of Professor Preston, a portion only of which was cited by the majority below. Preston's testimony on direct, quoted by the majority (Pet. App. 48, note 36), is carefully selected. Though it seems to imply

the view that by using resale restraints Sylvania improved interbrand competition among manufacturers, a fuller reading reveals that actually Preston scrupulously avoided saying that. On cross examination Preston admittedly backed away from any such claim. As to the manufacturer level, he conceded that Sylvania was neither a failing company nor even a weak company (R.T. 2954-55) and that he "certainly [was] not" saying that Sylvania's restrictive distribution system helped Sylvania gain or maintain its market share. (R.T. 2955-56) Indeed, Preston admitted that economic theory provided no way to tell whether a restrictive distribution policy yields an off-setting advantage to competition at the manufacturer level. (R.T. 2956-58) He conceded that so far as he could tell Sylvania's post-1962 market share could have been due to any one or more of several factors such as new management, new advertising programs, and an improved product, all of which occurred at the same time as the change in the distribution system. (R.T. 2955)[17]

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[17]The significance of market share evidence in this case is the indication it gives that manufacturers with small shares have stayed in the market and apparently continued to prosper. (R.T. 2771, 2878-79)

It is also of note that Professor Preston conceded on cross-examination that Sylvania's policy reduced the number of dealers in any area, stating "yes, of course, that is the essence of it" (R.T. 2914-15); that restrictions on resale territories and customers "has an anti-competitive dimension" (R.T. 2917-18) and that such restriction is "serious". (R.T. 2920-21) (Preston's complete testimony appears at R.T. 2872-2970, and is printed in its entirety in the Joint Appendix.)

IV. GRANTING A MANUFACTURER THE POWER TO RESTRICT INTRABRAND COMPETITION WILL ADVERSELY AFFECT CONSUMER WELFARE AND RESOURCE ALLOCATION.

There is a different economic concept than that adopted by the majority below. It is the economic concept embodied in the Sherman Act. It asserts that vertical restrictions, like other restrictions on competition, are harmful. In the first place, if the impetus for enforcing a manufacturer's resale restraint comes from a competing dealer, as it did from Handy Andy in this case, one dealer by influencing the manufacturer has power to decide whether or not it will have to suffer the competition of another. The vertical resale restraint then works very much like a horizontal resale restraint. *White Motor Co. v. United States,* 372 U.S. 253, 267 (1963) (Justice Brennan concurring); Cf. Bowman, *The Prerequisites and Effects of Resale Price Maintenance,* 22 Univ. Chi. L. Rev. 825 (1955). But even when enforcement initiative comes from the manufacturer, consumer welfare is injured. Restricting resale areas will tend to keep dealers from encountering each other. Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath,* 81 Harv. L. Rev. 1419 (1968). To the extent that separate geographic markets are insulated, as were Sacramento and San Francisco here, intrabrand competition is eliminated. The more general significance of this will depend upon how effectively the restricting manufacturer has differentiated its brand. At the retail level, just as in manufacturing, rivalry between traders tends to hold prices down and to motivate efforts to reduce

costs while increasing quality, service and customer convenience. See *Northern Pacific R.R. v. United States,* 356 U.S. 1, 4-5 (1958).

Moreover, competition at the retail level, as at others, fosters economic stability, fair and rational income distribution, and an economic climate in which any person can aspire to independence and growth. Dispersion of political, social and economic power is also encouraged, as are fair and objective decisions dictated by market forces; and discretionary decisions by executives of firms with market power are avoided. These values are all relevant to the development of a sound antitrust policy with respect to the distribution sector. See, e.g., *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964); *Brown Shoe Co., Inc. v. United States,* 370 U.S. 294 (1962).

The assertion by the majority (Pet. App. 49-50, note 37) that resale restraints may be needed to encourage dealers to handle a manufacturer's product is groundless. As shown in Part II, supra, less restrictive enticements are available. Absent restraints, some dealers will no doubt seek to invade the territory of others. If an invading dealer is more efficient and more effective than the one it challenges, it is indeed possible that it will drive the latter dealer out of business. But whether the invading dealer alone survives, the existing dealer alone survives, or both survive, this contest is precisely what the Sherman Act protects. The Act envisages decisions about price, area and other important matters being made by numerous competing dealers, some of whom will

judge right and some of whom will judge wrong. It does not sanction a monolithic and untested judgment by the manufacturer acting as a "manager" of all the units in the economy handling his product. To the contrary, the Act mandates that a public judgment be made in the market place, where the dealer bets his capital that he knows what he is doing and the consumer votes with his purchasing power to tell the dealer whether he is right or wrong.

The contentions of the majority (Pet. App. 49-50, note 37) that a manufacturer must impose resale restraints to encourage dealers to provide point-of-sale promotion, display facilities or post-sale services also fail. It is argued that no dealer will incur these expenses if others are free to invade the market. To the extent these arguments relate to a real need it can be met through less restrictive means. (See Part II, supra) But the more comprehensive response is that competition should determine what the public really needs or wants. For example, consider the claim about display facilities. If some segment of the public prefers expensive shopping amenities to lower prices, it will pay the higher prices these require. A dealer who bets his capital that he can sell more by lowering prices and skipping the frills will lose. But if customers prefer the low prices, that dealer will prosper. This is what should happen. If the public generally, or some significant segment of it, should in fact prefer to skip the amenities and pay the lower price, and if some dealer is ready to risk his capital on a judgment that this is so, it would be a grave distortion of the competi-

tive process to allow the manufacturer to impose on all concerned its narrower conception of an orderly market. True, if most dealers offer amenities, a few back-street discount houses may operate on an order-taking basis, at lower prices than department stores and other traditional retail merchants who find display facilities in their own self-interest. But again, such a situation will only arise if the market supports it; and further, the existence of that back-street order-taker is hardly a great social evil which warrants distortion of the competitive process. There are always rewards, of sorts, for the imitator as well as the innovator, the back-street trader, the second-hand dealer, and others. There is room for them as well as for the major merchandisers. Such variety gives zest and color to the urban market place, and makes it the stimulating bazaar it is.

Next, consider the "post-sale service" aspect of the "free ride" theory. When a manufacturer determines that merchandise must be sold at a price which will produce a high enough profit to allow for post-sale service and therefore gives its dealer territorial protection, the manufacturer is actually giving sanction to a tying arrangement which enables the dealer to carry on an unprofitable or break-even service department with the supra-competitive profits gained on protected sales. This also distorts the allocation of resources which competition would generate. Dealers offering goods to the public should compete with each other in the sale of those goods; those offering repair service to the public (whether the same dealers

or others) should compete in the sale of such service. If a single seller wishes to offer a "package deal," such as a TV set plus a year's service at a single price, there can be no objection, so long as the alternatives of separate purchases are open to buyers. But to say that a manufacturer can provide protected areas in order to enable dealers to gain excess profits on sales, with which to subsidize a service department, is to radically distort the competitive process.

The majority's view assumes that the manufacturer knows better than the market how dealers ought to be deployed and what services and facilities they should offer in order to maximize output. But this argument, like the comparable one in favor of resale price maintenance, assumes that the manufacturer will always know what is best and that his administered judgment about the ideal deployment of outlets across the nation will be more efficient than the deployment achieved through the myriad individual decisions by dealers who have invested in the distribution process. This assumption undercuts the primary policy commitment of the antitrust laws, and the conviction that individual market decisions are likely to be more sensitive, flexible and accurate gauges of the way resources should be deployed than any monolithic, administered decision. The contrary view also involves that same display of paternalistic overreaching as does the view that manufacturers should be allowed to set resale prices. Both would accord to the manufacturer, though it is not bearing the risk or expense of forward integration, the prerogative to dis-

place the presumably independent dealer-businessmen, who are bearing that risk and expense, in the making of crucial business decisions.

The "skimming" argument made by the majority (Pet. App. 49-50, note 37) also has a moral or ethical quality. An invading dealer is seen as a shadow figure who moves into someone else's territory to "pirate" sales apparently viewed as belonging to the local dealer, and then disappears, having invested nothing, yet reaping a profit. This argument cannot be made in support of Sylvania's resale location restriction, as distinguished from a territorial restriction in the *Schwinn* form, because Sylvania's restriction does not preclude the distant dealer only from entering without investment; that is just what Sylvania claims the distant dealer may do. To the contrary, Sylvania's restriction precludes the outside dealer from entering with an investment—from opening a store where he wants to sell.

But the "skimming" argument has a more basic defect which becomes apparent when one looks beyond the surface of the metaphor. The majority does not explain how the outside dealer is able to skim. The only possible explanation is that the local dealer has been able to amass sufficient market power to generate high profit sales. The only thing that could conceivably be "skimmed" is the "cream" on the top of the market—high profit sales—that is, sales which can be achieved either at higher prices or at lower costs than most sales. Such sales must be to buyers with a fixed preference for the particular manufacturer's

brand—to those who will pay more, or who can be sold with less expense, despite the options open to them as a result of interbrand competition. See Zimmerman, *Distribution Restrictions After Sealy and Schwinn,* 12 Antitrust Bull., 1181, 1182-86 (1967). If each dealer has territorial protection, customers committed to the brand and unaffected by interbrand competition *will* pay the protected dealer's asking price. As these customers view the market, the protected dealer is a monopolist. Interbrand competition means little or nothing to them. However, if another dealer "invades" the territory, intrabrand competition is provided. These presold, brand-committed customers then have more than one option. Therefore, "skimming", well analyzed, turns out to be merely providing competition where none before existed; and this is what the Sherman Act is intended to encourage. See *Copper Liquor, Inc. v. Adolph Coors Co.,* 506 F.2d 934, 941, 943, note 5, rehearing denied, 509 F.2d 758 (5th Cir. 1975).

V. THERE IS NO FAILING COMPANY OR RETROACTIVITY DEFENSE TO BE PRESERVED FOR FURTHER PROCEEDINGS IN THE COURT OF APPEALS.

Sylvania, at page 10 of its brief in opposition to the petition for certiorari, claims to preserve here and for proceedings on remand from this Court a failing company defense and a retroactivity defense. In neither case is there a defense to be preserved. This Court should say so, and make sure by its mandate that this case, already five years in the Court of Appeals, is not bogged down in that court again.

A. The Holdings of Schwinn and Other Cases Show That The "Remaining In Business" Instruction Was Properly Denied.

The majority below said it was "unnecessary now to decide whether there was sufficient evidence to warrant instructing the jury on the failing company defense", but, for the district court's guidance, that even if a company is prosperous overall "the failing company defense is applicable if the company is failing in . . . [only] one of its significant products". (Pet. App. 53-54, note 41) The issue thus mooted is hypothetical and should not be allowed to further delay final disposition of a case that has been taxing the time and resources of the courts and the parties for twelve years. *First,* there is literally no evidence that Sylvania was failing either as a whole, or in its TV business. *Second,* Sylvania did not request a failing company instruction. Rather, it asked for an instruction which would allow the jury to consider in justification factors which *Schwinn* rejected. (See Sylvania's requested instruction No. 61, C.T. 1299-1301) These points can be quickly demonstrated.

Sylvania's resale restrictions were initiated in 1962. It was stipulated that Sylvania's company-wide profits from all operations were $24 million in 1960, $8½ million in 1961, $17 million in 1962, $40 million in 1965, and in excess of $84 million in 1966. (R.T. 2614-17) Sylvania introduced no evidence to show what portion of these profits came from TV sales for 1962 or any other year. It did not introduce any evidence of the capital invested in that part of its business or any other, or any evidence as to the rate of return on investment.

Sylvania's only justification evidence was that in 1962 it was not satisfied with its share of the TV market. Its only witness on the point was Ray Steiner, a Sylvania sales supervisor, who said the "sales branch" of Sylvania "considered economic alternatives" and concluded that *if* the company distribution program didn't work, and *if* it didn't increase its market share, and *if* it didn't keep operating its Batavia plant, there was the alternative that it *might* go out of the television business. (R.T. 2543-44) Though Sylvania's President, Robert Theis, its Comptroller and Chief Financial Officer, Lee Lockhart and its Vice-President for Marketing, John Morgan, all presented testimony, none said or implied that the TV business was anything but profitable in any year, or that Sylvania had at any time even considered going out of the TV business. Further, the parent company, G.T.E. Sylvania Incorporated,[18] offered no testimony at all respecting any such proposition. Surely a jury should not be allowed to infer from the fact that Sylvania had a small market share in 1962 that its TV operations were failing. A firm with a small share of a large market could be earning the same return, a smaller or a larger return than one with a large share. From share statistics alone—and

[18]From 1962 through the time of trial Sylvania conducted its TV business by way of a subsidiary corporation, Sylvania Electric Products, Inc., which was wholly owned by General Telephone and Electronics. During appeal Sylvania eliminated such subsidiary and continued its TV business by and through the former parent, renamed G.T.E. Sylvania Incorporated, which was substituted as appellant (now respondent) herein.

that is the only evidence, save the sales supervisor's statements of dissatisfaction—it is simply not possible to draw any inference about profitability.

Clearly, Sylvania cannot avoid the antitrust laws if it was not failing—if, as the evidence shows, it was small but profitable. Being dissatisfied with one's share of the market has never been an antitrust defense even for a firm that might leave the business unless it is granted an antitrust exemption with which to pursue a larger share. *Citizen Publishing Co. v. United States,* 394 U.S. 131 (1969) emphasizes that to qualify for such exemption a firm must be literally failing. *Citizen Publishing* also shows that a firm claiming the justification must have exhausted all other alternatives before it may resort to conduct otherwise unlawful in order to save itself; such standards govern whether the failing company defense is claimed "in a merger or in any other case" (394 U.S. at 138. See also *United States v. Greater Buffalo Press, Inc.,* 402 U.S. 549 (1971). Here, there were several less restrictive, lawful alternatives (exclusive dealerships, primary responsibility clauses and location clauses) which Sylvania did not try. (See Part II, supra). Furthermore, even if Sylvania had been a failing company in 1962 (which it was not), that fact would not justify a predatory foray at the demand of a protected dealer, launched more than two years later when conditions had changed and prosperity had arrived. Compare *United States v. Jerrold Electronics Corp.,* 187 F.Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

The failing company issue is hypothetical also because the instruction which Slyvania sought and the trial court denied would not have been justified even if there were credible failing company evidence. The requested instruction would purport to "justify" conduct otherwise unlawful upon a showing that confining areas where dealers could resell was needed for *either* of two reasons: (1) "to enable Sylvania to remain in the television business"; (2) "to enable it to increase the strength and effectiveness of its competitive efforts." (Sylvania's requested instruction No. 61, C.T. 1299-1301, 1300; Pet. App. 15, note 11) This "justification" is nearly as permissive as Sylvania's "rule of reason" request. It would protect even a well entrenched, financially successful firm which either: (1) did not plan to "remain in the television business" unless it could use otherwise unlawful resale restrictions; or (2) felt that the use of such otherwise unlawful restrictions would "increase the strength and effectiveness of its competitive efforts." To allow such an inclusive exception would negate *Schwinn* entirely. (See 388 U.S. at 375). Compare, *United States v. General Motors Corporation,* 384 U.S. 127, 142 (1966).

B. Sylvania Has Shown Neither A Clear And Established Rule Sanctioning Its Conduct At The Time It Acted, Nor Any Element Of Reliance.

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) conceded a possible retroactivity defense where there was

> "a clearly declared judicial doctrine upon which [the party] relied and under which its conduct

> was lawful, a doctrine which was overruled. . . ." (392 U.S. at 496).

Sylvania seeks to preserve here its contention that *Schwinn* established new law overruling established doctrine upon which it relied. The attempt should fail, for Sylvania satisfies neither the "clearly declared" doctrine nor the reliance elements of the *Hanover* concept.

To show a prior established doctrine Sylvania cites *Boro Hall Corp. v. General Motors Corp.,* 124 F.2d 822 (2nd Cir. 1942), *rehearing denied,* 130 F.2d 196 (2nd Cir. 1942), *cert. denied,* 317 U.S. 695 (1943), which sanctioned a limit on where an automobile dealer might sell by reasoning that it "would not be a burden upon the sales of Chevrolet cars in interstate commerce as a whole, for anything the plaintiff lost the other dealers would gain." (130 F.2d at 197) Such a rationale was flatly rejected in *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959). But even before *Klor's* the *Boro Hall* case had ceased to represent, if ever it had, a clear and established doctrine, or a fit object for reliance.

Boro Hall was first placed in shadow by *United States v. Bausch & Lomb Optical Co.,* 321 U.S. 707, 721 (1944) where this Court said that a seller "may not lawfully limit by agreement . . . the persons to whom its purchasers may resell." *Boro Hall* was also out of harmony with cases holding horizontal territorial allocation unlawful (e.g., *Johnson v. Schlitz Brewing Co.,* 33 F.Supp. 176 (E.D. Tenn. 1940) *aff'd,* 123 F.2d 1016 (6th Cir. 1941)) and those hold-

ing vertical price fixing unlawful *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

By the late 1940's the Justice Department, using a *per se* theory, had started bringing cases against sellers who confined resale areas. In 1948 it obtained a consent decree in *United States v. Libby Owens Ford Glass Co.*, 1948-49 CCH Trade Cases ¶62,323 (N.D. Ohio 1948). Thereafter, scarcely a year passed in which similar suits were not brought and similar decrees entered.[19] Commentators, moreover, long regarded the legality of such restrictions as anything but clear. Judge Rifkind, as early as 1954, told antitrust practitioners, he "would not, in advising a client, rely strongly on *Boro Hall,*" and added, as to promises confining resale areas:

> "I think . . . these promises . . . extremely dangerous. Regardless of the extent of the market affected or any other consideration, I think it quite likely that a set of such promises, with various distributors, would be held unlawful as a direct elimination of competition." Rifkind, *Division of Territories,* in Van Cise and Dunn, *How To Comply With The Antitrust Laws,* 127, 134-135 (1954)

[19]See the collection of sixteen such decrees entered betwen 1948 and 1962 which are cited in Stewart, *Franchise or Protected Territory Distribution,* 8 Antitrust Bull. 447, 470 n. 51 (1963). This enforcement program, its results and the doubt it cast on *Boro Hall* were widely noted in the literature. E.g., Jordan, *Exclusive and Restricted Sales Areas Under The Antitrust Laws,* 9 U.C.L.A. L. Rev. 111, 142-155 (1961), Kessler & Stern, *Competition, Contract and Vertical Integration,* 69 Yale L. J. 1, 113 (1959). The Justice Department's view of per se invalidity was also given currency before Congress: *Automatic Distribution, Hearing Before Senate Committee on Interstate and Foreign Commerce,* 85th Cong., 2d Sess. 65-66 (1958); *Automobile Marketing Legislation, Hearings Before A Subcommittee of House Committee on Interstate and Foreign Commerce,* 84th Cong., 2d Sess. 359-65 (1956).

See also Stone, *Closed Territorial Distribution: An Open Question in the Sherman Act,* 30 U. Chi. L. Rev. 286, 288 (1963).

Next followed *White Motor Co. v. United States,* 372 U.S. 253 (1963). The District Court, viewing it per se unlawful to confine resale areas, granted summary judgment. The Supreme Court reversed, intimating "no view one way or the other on . . . legality" (372 U.S. at 261), because it felt a fuller record was needed before the governing rule could be fashioned. None could have read that case as leaving it "clear", or as inviting reliance, that after trial such restraints would be held valid. A typical comment on the *White Motor* case read as follows:

> "All [of the considerations involved] militate toward eventual per se treatment of the problem—a solution which would extricate the courts from this morass of inconclusive speculation, strike down the conceded restraints of trade, and remit manufacturers to available, less restrictive means of inducing their dealers to compete with other brands." Note, *The Supreme Court, 1962 Term,* 77 Harv. L. Rev. 62, 172 (1963).

Significantly, on remand the defendant in *White Motor* signed without trial the consent decree forbidding area confinement which had become so typical. (1964 CCH Trade Cases ¶71,195 (N.D. Ohio 1964))

Before Sylvania acted against Continental in September, 1965, there was one additional development:

Schwinn was decided in the district court. As this Court later noted, the case involved "challenged *vertical restrictions* as to *territory* and dealers. The source of the restriction is the manufacturer." (388 U.S. at 273) (emphasis added) The district court saw territorial confinement as *per se* unlawful and enjoined *Schwinn:*

> "from limiting the territory within which any wholesaler or jobber may sell any Schwinn product which it has purchased. It held that there are agreements to divide territory and, as such, are *per se* violations of §1 . . . ." (388 U.S. at 376)

On appeal that principle was later adopted and expanded by this Court.

Given this history, it surpasses credulity to claim that when Sylvania acted against Continental in Sacramento, *Boro Hall* stood as "clear and established doctrine" under which Sylvania could lawfully confine a dealer's resale area. As Mr. Justice Clark remarked: in light of the history and "the general understanding in the antitrust bar," even a law student would have said, "Look, Mr. Sylvania, you'd better watch out." (R.T. 3572-73) This conclusion is reinforced when it is recalled that Sylvania proceeded against Continental on the demand of its protected dealer, Handy Andy (see *White Motor Company v. United States,* 372 U.S. 253, 267 (1963)), and in a coercive manner. (See *Simpson v. Union Oil Company of California,* 377 U.S. 13 (1964)). The retroactivity defense is an equitable principle; when available at all, it can be claimed only by one who has proceeded irreproachably.

Sylvania also fails to meet the second *Hanover* prerequisite: it offered no evidence to establish that in fact it relied on *Boro Hall,* or any other legal doctrine. The evidence is to the contrary, that it proceeded unheeding of the law. *First,* the record shows that Continental obtained legal advice, so informed Sylvania, and acted on it. (R.T. 279-80, 1534-35) But we are left to speculate whether Sylvania did the same and, if so, what advice it received. Since such missing information is within Sylvania's control, and particularly in light of the historical development and climate of antitrust opinion reviewed above, the inference is strong that Sylvania obtained no advice or advice adverse to it. *Second,* a sense of guilt is projected by Comptroller Lee Lockhart's anxiety that Sylvania's involvement in the attack on Continental be hidden (R.T. 311, 3255), hardly the attitude of one acting under an established legal doctrine. *Third,* Sylvania persisted in the use of the elbow room restrictions after *Schwinn* was decided by this Court and through the time of trial in this case. (R.T. 91, 643, 2541-42, 3511-12) This alone destroys any contention that Sylvania acted in reliance upon pre-*Schwinn* doctrine which was overruled by *Schwinn;* if the basis for the practice had been reliance, when the object of reliance ended the conduct would have changed.

Finally, if (as Sylvania has been insisting throughout this long litigation) this case differs from *Schwinn* because of the form of Sylvania's restraint, then Continental is entitled to "the fruits of successful litigation". *Simpson v. Union Oil Company of California,*

396 U.S. 13, 14 (1969). Indeed, since Continental commenced this suit before *Schwinn* was decided in this Court, the "fruits of litigation" principle announced in the 1969 *Simpson* case entitles Continental to prevail even if *Schwinn* could be viewed as new law changing an old and settled principle on which Sylvania in fact relied. Continental did not start litigating on the strength of the government's victory in the *Schwinn* case. Continental has been persistently pursuing redress for a grievance of its own, a pursuit begun two years before *Schwinn* was decided in this Court.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded with direction that the District Court judgment and decree be reinstated in all respects. Further, Petitioners should be awarded reasonable attorney fees for Appellate proceedings in this Court and in the Court of Appeals below.

Dated, November 19, 1976,

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United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC, INC. and S.A.M. INDUSTRIES, INC., *Petitioners*,

vs.

GTE SYLVANIA INCORPORATED, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
OF THE
United States

October Term, 1976

No. 76-15

Continental T.V., Inc., A & G Sales, Sylpac, Inc. and S.A.M. Industries, Inc., *Petitioners,*

vs.

GTE Sylvania Incorporated, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT GTE SYLVANIA INCORPORATED

OPINIONS BELOW

The Opinion of the Court of Appeals (No. 71-1705) is reported at 537 F.2d 980 (9th Cir. 1976) and is reprinted in full in Appendix A to the Petition for Writ of Certiorari (Pet. Cert. App. A. 1-114). The verdict of the jury in the District Court in the form of answers to special interrogatories is not reported (A. 497-499).[1] After ren-

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[1] "A" refers to the Joint Appendix; "C.T." refers to the clerk's transcript; "R.T." refers to the trial transcript; "Ex." refers to trial exhibits; and "Pet. Br." refers to the Brief for Petitioners.

dition of the jury verdict and over objection by respondent, the District Court entered Findings of Fact and Conclusions of Law which are not reported (Pet. Cert. App. B. 115-129).

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1976. The Petition for Writ of Certiorari was docketed on July 8, 1976 and granted on October 18, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent statutory provisions are those set forth at Pet. Cert. App. C. 130-133.

QUESTIONS PRESENTED

At issue is the standard of legality under the Sherman Act to be applied to a vertical distribution practice whereby a manufacturer "franchises" its direct-buying retail dealers with respect to the locations at which the latter are authorized to sell products bearing the manufacturer's trademark. This selective method of distribution—commonly referred to as a locations practice—is typically employed for the purpose of enabling smaller manufacturers to develop a system of loyal and efficient dealers capable of offering effective interbrand competition.

On this appeal respondent seeks affirmance of the Ninth Circuit's holding that Sylvania's locations practice as implemented in Northern California in 1964-1965 is to be evaluated under the rule of reason rather than under a rule of *per se* illegality allegedly mandated by this Court's holding in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

Since petitioners' statement of the questions presented is, in respondent's view, inaccurate, we offer the following:

1. Is the legality of a distribution system entailing vertical agreements between a manufacturer with a small market share and its direct-buying retail dealers specifying and restricting the locations from which—but not the territories into which or the customers to whom—the latter are authorized to sell the manufacturer's trademarked products to be adjudged under the rule of reason rather than automatically condemned under a rule of *per se* illegality?

This necessarily presents two subsidiary questions:

a. Should the holding in *Schwinn,* which applied to a contractual closed territorial system precluding intrabrand competition between competing units, be mechanically extended to strike down all vertical restrictions which, like a locations practice, involve a type of post-sale restraint, without regard to the pro-competitive benefits derived from such practices?

b. If the holding in *Schwinn* did establish a *per se* rule applicable to a locations practice, should that holding be reconsidered in light of its questionable jurisprudential underpinnings and its fail-

ure to strike an appropriate balance between the legitimate interests of manufacturers and dealers?

2. Does any rule of *per se* illegality applicable to a locations practice contain an exception when that practice is reasonably necessary to enable the manufacturer to achieve and maintain an effective role as a competitor rather than fail in the relevant industry?

3. May any rule of *per se* illegality derived from *Schwinn* be retroactively applied, consonant with notions of fundamental fairness, to impose treble damages for conduct occurring at least two years prior to the *Schwinn* decision?

STATEMENT OF THE CASE

A. Economic Background.

Sylvania's locations practice was conceived and implemented as a competitive response to an increasingly poor market position. Sylvania was one of the brands to emerge in the television industry following World War II.[2] With black and white as the major product line, RCA established itself as the industry leader with as much as 60-70 percent of a market featuring some 131 manufacturers (R.T. 2766-2768, 2771; A. 382-386). Sylvania, together with Dumont, Stromberg-Carlson, Olympia and other lines, managed to capture only a small portion of the market (R.T. 2770; A. 385).

In the black and white era, most manufacturers utilized a "saturation" type of distribution (R.T. 2767-2770, 2773-2774; A. 382-388). This involved the sale of products to independent or company-owned distributorships who resold to retailers. In the late 1950's, however, Magnavox pioneered a limited or "selective" distribution system the thrust of which was to eliminate the middleman-tier between manufacturer and retailer and to develop its interbrand competitive position by the careful screening of its authorized retailers (C.T. 2774-2775; A. 387-389).

By 1960 Sylvania's market position had deteriorated markedly. Its attempt to maintain a saturation-type distribution policy in competition with RCA, Zenith and others was wholly unsuccessful. (See, *e.g.*, R.T. 2771-2772; A. 385-387.) Sylvania's market share was a dismal 1 to 2 percent—well below the level considered necessary to sustain profitable operations in light of the high costs associated with television production and distribution (R.T. 591; A. 179-180). With the advent of color and the concomitant increase in production and distribution costs, Sylvania was confronted with the stark choice of either improving its competitive position through a different distribution technique or going out of the television business. The uncontradicted testimony of Ray J. Steiner, Vice-President of the Sony Corporation of America and former National Sales Manager of Sylvania, describes Sylvania's market dilemma: while the corporation was not in financial difficulty considered as a whole,

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[2]The text portrait of the television industry derives principally from the testimony of William E. Boss, Vice-President of Marketing of Sylvania's Home Entertainment Products Division (R.T. 2761-2813; A. 379-401). Mr. Boss, who was Chairman of the Board of the Consumers Electronic Group of the Electronic Industries Association, testified on the basis of some 15 years' experience with RCA, followed by 2 years each with Admiral and Motorola preceding his employment by Sylvania in 1967.

there was grave doubt about its ability to compete in the television market and consequent concern about the wisdom of committing its economic resources to that endeavor. As Mr. Steiner testified:

> "Q. To your knowledge, sir, did the sales branch of Sylvania consider any economic alternatives back in 1962, '63?
>
> "A. Yes.
>
> "We knew that if the advent of this program, if it didn't work and we didn't increase our market penetration, if we didn't keep our plant running in Batavia, there was the alternative that we would probably go out of the television business." (R.T. 2544; A. 365-366).[3]

[3]Additional evidence of the failing character of Sylvania's television business appears in the testimony of Donald Carroll, Regional Sales Manager for Sylvania's Northern California region who, when asked to describe the market conditions in which Sylvania found itself in about 1962, testified:

> "A. In that type of distribution you had most of the suppliers in the United States and two were notably successful, RCA and Zenith, and then the Motorola, the Philco, the Admirals, the Olympics, the Sylvanias, General Electric, Westinghouse, etcetera, were actually floundering and Sylvania especially was floundering to a point where the management decided either they had to come up with a more meaningful form of distribution for their product or cease being a supplier of television and stereo.
>
> "Q. You mean simply go out of business?
>
> "A. Go out of that particular part of the business.
>
> "Q. Sylvania, of course, manufactures other products?
>
> "A. Correct.
>
> "Q. Like flashbulbs—
>
> "A. Light bulbs.
>
> "Q. Light bulbs. I'm not sure what else, but that was the issue as you understood it based on your conversations with the manufacturer?
>
> "A. That is correct." (R.T. 590; A. 179).

See also testimony of John T. Morgan, former President of Sylvania Entertainment Products Corporation, (R.T. 406; 439-440; A. 131-2) and the testimony of William E. Boss (R.T. 2776; A. 389-390).

B. Adoption of the Locations Practice.

To tackle the problem Sylvania engaged a new executive team headed initially by Robert Theis, later assisted by John T. Morgan. Both had formerly been employed by Philco and were thus familiar with the distribution practices in the industry. After careful study Sylvania's management concluded that there was room for Sylvania as a competitor in the growing color market if it could develop a prestige image and attract a group of dealers with sufficient loyalty to "push" the product (R.T. 439-440; A. 131-132). The market goal was to "become another Magnavox"—to increase Sylvania's market share from the 1 or 2 percent level to a sustainable and profitable level in excess of 5 percent (R.T. 594-596; A. 182-183). Thus the key notion underlying Sylvania's market decisions in the critical 1961-1962 period was the intent to make Sylvania, in conjunction with its dealers, a more effective competitor of RCA, Zenith and other major brands (R.T. 2773-2781; A. 386-394).

Sylvania's solution, ultimately called its "elbow room policy", was the adoption of a technique of limited rather than "saturation" distribution designed to attract select retailers willing to hold themselves out as authorized Sylvania dealers (R.T. 2776-2779; A. 389-392). Following the Magnavox lead, Sylvania altered its distribution system in major metropolitan markets by phasing out most of its wholesale distributors as well as its factory owned distributorships in favor of direct factory-retailer distribution. As a consequence, inventory availability and credit extension became Sylvania's direct responsibility as did selection of retailers based upon their perceived attitude

and potential. Pursuant to this new approach, Sylvania attempted to "franchise" only dealers who were willing to invest in high-grade facilities, carry a representative line, provide customers with a full range of services and engage in extensive advertising and in-depth market coverage in their particular locale (R.T. 2543-2550; A. 365-370).

C. The Locations Practice in Operation.

The new distribution system involved execution of a franchise agreement between Sylvania and each retailer terminable by either party upon ten days written notice to the other (Ex. 3; A. 18-22). While not specified in the written terms, the franchise agreement was understood as applying only to such locations as were mutually agreeable.[4] Sylvania reserved to itself the right to determine whether it would sell to a particular retailer for resale as an authorized Sylvania dealer at a designated location (R.T. 2778; A. 391). This was true whether or not a particular dealer was authorized to sell Sylvania products at one or more other locations. Put simply, a dealer authorized *somewhere* as a Sylvania franchisee was not authorized *everywhere;* Sylvania did not franchise chains as such (R.T. 420-1; A. 123-125).

The policies employed in implementing Sylvania's locations practice included the following:

[4]The initial location was normally noted on Sylvania's dealer information form transmitted by Sylvania's district salesmen to its headquarters at Batavia, New York. When Sylvania agreed to franchise subsequent or branch locations, the dealer was orally advised by his salesman and the action was recorded in appropriate account sheets at headquarters. (See, *e.g.*, R.T. 420, 500-504; A. 123-124, 150-154.)

1. No retailer had the right to veto Sylvania's decision to franchise another location in a particular market area. Sylvania made its determination to franchise or not with reference to such factors as market penetration and quality of the prospective dealer, but without prior approval by any existing authorized retailer. (See, *e.g.*, R.T. 446-7; 2550-1; A. 136-137; 369-371.)

2. While the purpose of the policy was to "space" dealer locations, Sylvania at no time entered into any agreements or understandings restricting the freedom of an authorized Sylvania dealer operating from a franchised location to sell to anyone wherever situated. (See, *e.g.*, R.T. 645, 2550; A. 193-194, 370.)

3. Sylvania encouraged its authorized dealers to handle competing lines, including RCA, Zenith, Philco and other major brands, and entered into no understandings or agreements limiting a dealer's independent choice with respect thereto (R.T. 2550; A. 370).

4. Sylvania did not engage in any understandings or agreements whereby a particular dealer was afforded an "exclusive"; at all times Sylvania reserved the right to authorize a Sylvania dealer to function in an area in competition with an existing dealer. (See, *e.g.*, R.T. 432; A. 126-7.)

5. While Sylvania did not extract promises from its dealers not to sell from unauthorized locations, such sales activity was plainly contrary to the "sense" of the distribution system. We here take it as established that Sylvania's locations practice as it func-

tioned in Northern California in 1964-1965 involved an implied agreement between Sylvania and its dealers to the effect that dealers would not move inventory owned by them to unfranchised locations for resale without Sylvania's approval.[5]

D. Competitive Effects of the Locations Practice.

Sylvania's new distribution technique proved successful (R.T. 589-596, 2554; A. 178-183, 372). From 1962 to 1965 RCA and Zenith maintained their leadership positions while other manufacturers fell by the wayside. But Sylvania was able to attract aggressive dealers, improve its product image and expand its market share to approximately 5 to 6 percent nationally (R.T. 651; 2770-2779; 2878-2879; A. 198, 385-392, 405-406). It thus emerged as a viable competitor, ranking approximately eighth or ninth in the country with a modest but sustaining market position. In the opinion of its marketing personnel, Sylvania's revival as an interbrand competitive factor was a direct result of its locations practice (R.T. 651; 2554; A. 191-192, 372).

Sylvania's success was particularly striking in the greater Sacramento area where its market share exceeded

[5]At trial Sylvania contended that its locations practice involved no agreement—be it express or implied—with its franchised dealers with respect to the movement of inventory. It was Sylvania's position that it conceived and implemented its distribution practice unilaterally as an announcement upon which its distribution system was based and not as part of any "contract, combination or conspiracy." (See *United States v. Colgate & Co.*, 250 U.S. 300 (1919).) However, on appeal Sylvania defers to the findings of the jury and assumes that its locations practice did involve a "combination" or "conspiracy" within the expanded scope of those concepts as articulated in such cases as *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968), and thus went beyond the unilateral in the respects noted in text.

13 percent in 1965 (R.T. 635; A. 186). While one retail dealer, Handy Andy, enjoyed the largest share of the Sacramento area business, other franchised dealers operating both within the City of Sacramento itself (a branch of the Sherman Clay chain) as well as from locations in suburban Roseville and Woodland—locations well within the 25-50 mile radius of practical marketing—guaranteed effective competition in the Sylvania product line in the Sacramento market area (Ex. 70; R.T. 526-532, 1113-1117; A. 163-168).[6]

Indeed, during 1964-1965 Sylvania's locations practice resulted in fewer but more select dealers competing in Northern California with at least two or more such authorized dealers serving every metropolitan market larger than 100,000 in population.[7] In all Northern California areas there were a large number of dealer outlets and available brands.[8] Sylvania's locations practice thus imposed no meaningful restriction on customer choice and did not deny other manufacturers access to retail out-

[6]Petitioners' repeated assertion—complete with foldout chart—that Handy Andy was "given" the "entire Sylvania market" in the Sacramento area (Pet. Br. 8-9, 35, 38) is simply argumentative hyperbole.

[7]Both at trial and now in their Brief (Pet. Br. 6-7) petitioners cleave to a phrase in an early intra-company manual for salesmen which stated that Sylvania's distribution policy "eliminates 'same brand competition'." But as all of the witnesses recognized, this language was essentially inaccurate in view of the fact that Sylvania's locations practice—while concededly limiting intrabrand competition—was never applied in Northern California in such a way as to prohibit such competition. (See, *e.g.*, R.T. 468-473, 646-647; A. 141-145, 194-195.)

[8]For example, in Sacramento in 1965, there were approximately 100 retail dealers (R.T. 1183; A. 285), and there were approximately 25 brands on the market.

lets.[9] Nor did it have any adverse impact on output or prices. From 1962 forward, there was a steady increase in product volume and decrease in price both for Sylvania brand merchandise and in the television market in general (R.T. 2785-2787; A. 394-396).

Based on these facts, a prominent economist, Professor Lee Preston, Jr. (formerly a member of the Neal Task Force on Antitrust Policy under President Johnson and a consultant to the Department of Justice and Federal Trade Commission) testified as to the competitive effects of a television manufacturer, such as Sylvania, employing a selective distribution policy including restrictions on the locations of dealers. His opinion was that such a practice "has no effect on the strength of competition in the market as a whole because there are so many outlets, so many competitive alternatives throughout the market." (R.T. 2885; A. 411). He further testified:

> "The particular choice of a dealer by a manufacturer is no more an element in determining the strength of competition than, for example, the consumer's choice of one product over another. It is the consumer's ability to choose that is competitive." (R.T. 2886; A. 412).
>
> * * * * *
>
> "Therefore, if this distribution policy or any particular distribution policy has the effect of strengthening Sylvania or any other smaller firm as a competitive force among the other firms in that market, many of which are larger, then I think we

[9]Customer choice was enhanced by the fact that neither Sylvania nor most other manufacturers attempted to restrict the brands that dealers handled, and most dealers handled more than one brand.

> have to look carefully at that policy as an element in competition, indeed as a pro-competitive policy among the brands and the manufacturers as a whole." (R.T. 2888; A. 413).

Professor Preston concluded that there were no anticompetitive characteristics in such a distribution practice.[10]

E. The Sylvania-Continental Business Relationship.

Petitioner Continental T. V., Inc. became a Sylvania dealer in May 1964 at which time it was franchised to sell Sylvania products at stores located in San Leandro and San Jose. It then and subsequently utilized a "promotional" method of selling which featured home demonstrations based on telephone contacts with prospective customers (R.T. 352-354; A. 113-115). As a consequence it was able to make sales at distances 25 to 50 miles and beyond from its store locations with some frequency (R.T. 1599-1603; A. 335-337). It also managed to charge some $50 to $100 per set above Sylvania's suggested resale prices (R.T. 1595-1597; A. 332-333).

Continental's initial orders were purchased from Sylvania on open account. But in July 1964 Continental

[10]While Professor Preston's opinion was subjected to the usual form of cross-examination, it remained unaltered. Contrary to petitioners' assertion at Pet. Br. 53, he "backed away" not at all. (See R.T. 2968-2969; A. 472-473.) While colloquy between bench and bar early in the trial suggested that the trial court might be disposed to instruct the jury that a locations practice was illegal *per se* (R.T. 609-633), the trial court nevertheless permitted Sylvania to offer such evidence concerning the purpose and effect of its locations practice as Sylvania believed sufficient to present its rule of reason defense. Continental had the opportunity to rebut that evidence but elected to stand upon its *per se* contentions. It thus offered no evidence—expert or otherwise—concerning whether a practice which limits the number of dealers carrying a particular brand has an adverse effect upon competition.

commenced financing purchases on the "Maguire Plan" pursuant to which Continental executed a promissory note for the price of each item secured by a trust receipt in favor of John P. Maguire & Co., Inc. ("Maguire"). Under this arrangement Continental was obligated to pay Maguire the price of each item immediately upon its sale by Continental except that for every item remaining unsold as of six months after the trust receipt and invoice date ("maturing items") payment was due and owing at the end of such six-month period. By virtue of the contractual relationships between Maguire and Sylvania, Maguire had full recourse against Sylvania for all sums advanced to dealers to finance purchases of Sylvania products. Consequently, Sylvania alone made all decisions concerning the amount of credit to be extended and whether additional credit would be extended at all (R.T. 2985-2988; A. 474-476).

By May 1965, Continental and its affiliates[11] were operating in some eight franchised locations in Santa Clara, San Mateo, Alameda and San Francisco counties. Aside from the San Jose store and warehouse facility in Santa Clara County, these locations were operated under short-term leases which required little capital investment while affording maximum flexibility and mobility in opening up and closing down (R.T. 1578-1580; A. 331-332).

[11]The affiliates are A & G Sales, a corporation; Sylpac, Inc., a corporation, and S.A.M. Industries, Inc., a corporation. The principal owner of all entities is George N. Shahood. All entities did business under the trade style "Continental T. V." and were treated by all concerned, both during the course of dealing and in litigation, as a single enterprise. (See discussion in the Opinion below, Pet. Cert. App. A. 41, fn. 30.) They are collectively referred to hereinafter as "Continental".

By May 1965, too, Continental had become one of the largest Sylvania dealers in the United States, with sales volume in excess of one million dollars on an annual basis. That volume was perceived by Continental's principal, George N. Shahood, as endowing Continental with sufficient market power in Northern California to justify a voice in and veto over Sylvania's decision with respect to whether it might franchise dealers proximate to Continental's locations. Thus in the spring of 1965 Continental objected to Sylvania's plans to franchise Young Bros., a retailer operating a facility in San Francisco relatively near Continental's Geary Street location, and threatened to cut down its volume of Sylvania purchases if such a franchise were granted (R.T. 1612-1623; A. 338-346).[12] When in June 1965, Sylvania advised Continental that it nonetheless intended to franchise Young Bros. in San Francisco, Mr. Shahood tore up a large Sylvania order, stormed out of a sales convention, placed a half million dollar order with Philco and advised Sylvania that Continental would indeed cut back its Sylvania purchases and sales (R.T. 656-669; A. 199-208).

Fundamental to Continental's meteoric expansion in location and volume as a Sylvania dealer was Sylvania's willingness to extend credit. However, in the spring of 1965, contemporaneous with the developing Young Bros. incident, Sylvania's credit department began to have seri-

[12]Sylvania's market share in San Francisco approximated 2.5 percent (R.T. 635; A. 186)—half its national and Northern California average—thus indicating to Sylvania the desirability of franchising additional dealers in that city (R.T. 665-669; A. 205-208). Precisely the opposite situation existed in Sacramento where Sylvania's market share exceeded 13 percent (R.T. 533-537; A. 186).

ous difficulties with Continental over late payments for merchandise and other matters relating to the financing arrangements. Although these problems appeared to have been resolved by discussions in June 1965 (R.T. 3152-3155), credit and payment difficulties worsened during the ensuing three months. Moreover, the credit implications of Continental's half million dollar order with Philco caused Sylvania's credit personnel concern over the continuation of Continental's very high ($300,000) credit line with Sylvania (R.T. 1050-1051).[13] In July, August and September 1965, Continental consistently made late payments for merchandise sold, and in September 1965 there appeared to be a tremendous increase in the floored merchandise which was unsold and on which obligations were passing into maturity and then into the delinquency stage (R.T. 783-791, 1077-1078; Exs. 51-66, 79; A. 215-223). Inexplicably, Continental also suspended all "renewal" or interest payments on its financing obligations (R.T. 790; A. 221).

To cap matters, in late August 1965, Sylvania's credit personnel at corporation headquarters—as distinct from those in the field (see Pet. Br. 15-16, fn. 5)—learned for the first time, from a Dun & Bradstreet report, that Mr. Shahood previously had been convicted of three offenses involving the writing of bad checks and misappropriation of government funds (R.T. 3156-3158; Exs. DY and DZ). As a consequence, in late August or early September, Sylvania's credit department placed a credit hold

[13]This concern was realized in September-October 1965 when Continental suspended payment for Sylvania merchandise but continued remittances to Philco.

on Continental's orders, and on September 16, 1965, reduced Continental's credit limit of $300,000 to $50,000 (R.T. 3015-3022).

While this crisis in credit relationships was developing, Continental advised Sylvania that it proposed to open a new store at a location in Sacramento. As described prior to August 1965, Continental planned to feature Philco merchandise at the Sacramento facility (R.T. 250-252, 533-537, 1626-7; A. 66-7, 168-171, 347-348). However, over the Labor Day weekend preceding September 5, 1965, Continental abruptly changed its plans and advised Sylvania that it was in the process of moving Sylvania merchandise from its warehouse to the Sacramento facility (R.T. 264, 1626-1627; A. 72-73, 347-348). Continental coupled the movement with a demand to Sylvania's salesman in the Santa Clara County area for the immediate grant of a franchise for the new store. (See R.T. 264-5, 271-3; A. 72-73, 77-79.) When the franchise was not forthcoming, Continental decided to keep the Sylvania merchandise in the Sacramento store (R.T. 1531-1535; A. 315-318).

There was evidence that the "Sacramento move" by Continental was motivated by the desire to retaliate against Sylvania for its decision to franchise Young Bros. in San Francisco and to force a reconsideration of that decision. (See R.T. 1626-32; A. 347-353.) But whether the motive was retaliation, market "skimming" or something else, the "Sacramento move" disturbed Sylvania's sales personnel, both because of the procedure followed (R.T. 2569-2571) and because of the belief held by some that Sylvania's market penetration in the Sacra-

mento area already exceeded reasonable expectations and that other Sylvania outlets there were unnecessary or undesirable (R.T. 533-541; A. 168-173).[14] Price played no part in these judgments particularly since, as previously noted, Continental generally sold at prices above Sylvania's suggested retail.

Since the credit cut described above followed the "Sacramento move" by approximately two weeks, Continental took the position that it derived, not from legitimate credit or payment concerns, but rather from a "scheme" by Sylvania to restrict Continental to its authorized locations well removed from Sacramento. Reacting to the credit cut and its deteriorating relations with

[14]Mr. Morgan testified that he talked to Mr. Keith Anderson, the principal of Handy Andy, after Continental made its "Sacramento move", as follows:

"Q. That was all that was said, Continental is here and they got merchandise, something to that effect?

"A. Right. Right. And we talked about some models and some styling, and he mentioned it, and I says, 'Keith, I don't want to talk about it.' I didn't talk about it."

* * * * *

"Q. All right. Now during the conversation with Anderson on the phone, did he make any complaint at all about Continental being at Sacramento?

"A. No, other than telling me that he is selling merchandise down there, and that's it.

"Q. He wasn't happy about it, was he?

"A. No, he wasn't happy about it, but he didn't threaten me or anything else. He just told me Continental opened up down there." (R.T. 430-431; A. 129-130).

This communication between Mr. Morgan and Mr. Anderson provides no evidentiary basis for petitioners' repeated assertion that Sylvania terminated Continental at the "instigation of its protected dealer, Handy Andy" (Pet. Br. 25) rather than as a result of Sylvania's own view of its self-interest—a view unquestionably influenced by the presence of Handy Andy as a valued customer in the Sacramento area. Be that as it may, the question presented concerning the standard of legality applicable to Sylvania's locations practice is unaffected by this incident. See discussion *infra*, at 40 n. 31.

Sylvania, Continental withheld all payments owing to Maguire for Sylvania merchandise (R.T. 1549-1551). This refusal to make payment persisted for over three weeks until at least $62,000 under Continental's own computation was due and owing, unsecured by any merchandise (R.T. 790-791; A. 221-222). At this point, on October 12, 1965, Maguire filed this action to collect the amounts due (including indebtedness accelerated because of the payment default). On the same date Sylvania notified Continental that its franchise as a Sylvania dealer was terminated (Ex. FB).

F. Proceedings in the Trial Court.

As noted above, this action commenced on October 12, 1965, when Maguire filed suit against Continental (C.T. 1). Since some of the promissory notes upon which suit was premised were secured by goods still in Continental's possession, claim and delivery proceedings were also instituted whereby Maguire repossessed and sold such merchandise pursuant to Uniform Commercial Code procedure. Attachments were attempted to secure the balance of the debt but proved unsuccessful because Continental had withdrawn all funds in its checking accounts in anticipation of the litigation (R.T. 1552-1553).

Continental answered, counterclaimed and crossclaimed on November 22, 1965 (C.T. 37). While denying that Maguire was entitled to judgment on its complaint for various reasons, Continental sought damages against both Sylvania and Maguire for alleged violations of the antitrust laws and for tortious injury to its business and property under California law. Issue was fully joined by

Maguire's Reply to the Counterclaim filed January 25, 1966 (C.T. 60) and the Sylvania-Maguire Answer to Cross-claim filed April 22, 1966 (C.T. 162).

After amendment of the pleadings following completion of discovery,[15] trial by jury was held before Justice Tom C. Clark, sitting by designation as United States District Judge.

G. The Jury Instructions.

At trial Continental claimed that the damages it had suffered during a period of product shortage following the rupture of relations with Sylvania had been proximately caused by Sylvania's adoption and enforcement of its locations practice. Although Sylvania contended otherwise, it also argued that if the legality of that practice were dispositive then the practice itself was lawful, or, in all events, should be evaluated under the rule of reason. The District Court rejected Sylvania's submission in favor of a *per se* rule: it specifically charged the jury that any effort by Sylvania "to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania" would be a violation of the antitrust laws "regardless of the reasonableness of the location restrictions." The critical instruction which, as the majority opinion below observes, "virtually assured" a verdict against Sylvania (Pet. Cert. App. A. 15), was as follows:

> "Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion or control over the products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of Section 1 of the Sherman Act, regardless of the reasonableness of the location restrictions." (R.T. 3447; A. 492).[16]

[15]Maguire's Amended Complaint appears at C.T. 689. Damages are therein sought for the total sum of $81,000 following a stipulation that this sum represents the aggregate amount advanced by Maguire to Continental for merchandise sold to Continental by Sylvania which had not been paid through court process or otherwise (C.T. 694). The amount was less than that originally prayed principally because of the credits derived from the repossessed merchandise (compare Pet. Br. 3, fn. 2). The Second Amended Cross-claim appears at C.T. 703. This pleading, like its predecessors, includes as its Fourth Cause claims for breach of contract against Sylvania and Maguire for alleged failure to supply or failure to finance certain merchandise ordered by Continental in August-September 1965. The breach of contract claim was ultimately withdrawn. The Answer to the Second Amended Cross-claim appears at C.T. 744.

[16]The Court rejected instructions proffered by Sylvania under which the jury would have been instructed that the challenged practice (if implemented by "contract or conspiracy") may be held illegal if it unreasonably restrained or suppressed competition in the relevant markets for television products. See Sylvania and Maguire's requested jury instructions Nos. 29 (C.T. 1157-8; A. 5-6), 31 (Revised) (C.T. 1161-1164; A. 9-12), 31c (C.T. 1270-1; A. 12-14) and 31d (C.T. 1272; A. 14-15). Petitioners criticize the language of these instructions (Pet. Br. 21, fn. 7) but we need not burden this Court with arguments on the subject since it is well settled that it is the duty of the trial court to instruct the jurors fully and correctly on the applicable law—a duty in nowise affected by any technical defects in a party's request to charge particularly when, as here, an entire theory of legality is at stake. (See, *e.g.*, *Lind v. Aetna Casualty and Surety Co.*, 374 F.2d 377 (5th Cir. 1967); *Marshal v. Isthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1964); 2B Barron & Holtzoff, *Federal Practice and Procedure*, §1102, pp. 447-448.) Similarly, the effect of the *per se* instruction cannot be cured "by a prior unexceptional and unilluminating abstract charge" of the kind given here. *Bollenbach v. United States*, 326 U.S. 607, 612 (1946). See also *DeLima v. Trinidad Corp.*, 302 F.2d 585 (2d Cir. 1962); *Callen v. Pennsylvania Railway Co.*, 162 F.2d 832 (3d Cir. 1947), *aff'd*, 332 U.S. 625

On November 6, 1970, the jury returned its verdict in the form of answers to special interrogatories (C.T. 1304-1306; A. 497-499). The jury found that Sylvania engaged "in a contract, combination or conspiracy in restraint of trade in violation of the antitrust laws with respect to location restrictions alone" and that Continental sustained damage as a proximate result thereof in the sum of $591,505.[17] However, Sylvania prevailed against the claim that its locations practice was coupled with unlawful price fixing.[18] The jury also found that

(1948). With all respect to the trial court, the charge to the jury given here can only be described as confusing except insofar as it (1) precludes a rule of reason evaluation of Sylvania locations practice (if that practice be found to be concerted in character) and (2) reflects rejection of Sylvania's "failing company" and retroactivity defenses. It was, of course, the ambiguities of the charge which shaped final arguments to the jury. Compare the misunderstanding of those arguments in Judge Kilkenny's dissent below (Pet. Cert. App. A. 58-60) with the correct reading of the majority (Pet. Cert. App. A. 14-16).

[17]The court instructed the jury that in order to find that a locations restriction proximately caused the damage claimed, that restriction need play only "a substantial part" in bringing about the damage, even though other legitimate conduct or purposes (such as credit decisions) might have also contributed to such damage (R.T. 3449). In view of the answers to the interrogatories respecting Maguire and the California tort claims, it seems plain that the jury found that, while attempted enforcement of its locations policies may have been one reason for Sylvania's conduct *vis-a-vis* Continental in September and October 1965, it was scarcely the primary motivating factor. Sylvania has made no claim of error with respect to the trial court's instructions or the jury's findings as respects proximate cause or damage issues.

[18]The use of separate interrogatories makes it plain that Continental's price fixing charge upon which it lost was distinct and severable from the vertical locations practice charge upon which it prevailed under *per se* instructions. Continental has had its day in court on its price fixing claims and ought not to be entitled to another in the event that the Ninth Circuit judgment be affirmed and the case remanded for retrial. See, *e.g., Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931). See also *Mack Trucks, Inc. v. Arrow Aluminum Castings Co.*, 510 F.2d 1029 (5th Cir. 1975); *Williams v. Slade*, 431 F.2d 605 (5th

Sylvania did not willfully or maliciously cause injury to Continental's business in violation of California law. Finally, Maguire was exonerated against all claims.

H. Findings and Judgment.

Following the jury verdicts Continental moved for entry of findings of fact and conclusions of law respecting its equitable prayer for an injunction (C.T. 1322). Continental's entitlement to such relief as well as its proposed findings were contested (see C.T. 1352, 1379, 1394) but the trial court ultimately resolved to enter a limited injunction premised solely upon the *per se* theory of its jury instructions. Findings and conclusions were thereupon entered in accordance with that determination (C.T. 1421-1434; Pet. Cert. App. B. 115-129).[19]

Cir. 1970); *Yates v. Dann*, 11 F.R.D. 386 (D. Del. 1951). In the Conclusion, *infra*, Sylvania proposes that any new trial be expressly limited to petitioners' locations practice claim under rule of reason standards thereby obviating any post-remand question respecting this matter.

[19]The critical conclusions of law are the following:

"3. Sylvania, during the time involved herein, and in violation of Section 1 of the Sherman Act, did engage in a contract, combination or conspiracy with its retail dealers, including Handy Andy and Continental, pursuant to which it restricted and enforced its location distribution policy and imposed a system of location restraints upon its retail dealers limiting for all practical purposes the areas in which they could display and sell Sylvania brand products which the dealers had purchased from Sylvania and which were owned by them.

"4. As a proximate result of Sylvania's conduct as above described, Continental sustained damage to its business and property as found by the jury. Moreover, equitable relief having been granted in the Judgment heretofore entered on the 11th day of December, 1970, the Court deems it necessary to enter in support thereof, the Findings of Fact and Conclusions of Law contained herein.

"5. The foregoing restraints are *per se* violations of Section 1 of the Sherman Act, inasmuch as Sylvania made sales

Concurrent with the proceedings on the injunction Maguire moved for summary judgment on its Amended Complaint (C.T. 1318). By stipulation of the parties the Maguire motion was granted in the sum of $145,000 as principal, prejudgment interest, costs and attorneys' fees. In addition to this award to Maguire, the Judgment duly filed December 11, 1970 awards Continental the sum of $1,774,515, being the verdict of the jury trebled, plus costs in the sum of $18,000 and an attorney's fee in the sum of $275,000 (C.T. 1366-1371; A. 500-505). On March 2, 1971, Sylvania filed its notice of appeal from those portions of the judgment below which awarded monetary and injunctive relief to Continental T. V. (C.T. 1437-1438; A. 506-507).

I. Ninth Circuit Proceedings.

By a 7-4 majority the Court of Appeals for the Ninth Circuit reversed the District Court's judgment and equitable decree and ordered the action remanded for a new trial.[20] The majority concluded that Sylvania's locations practice was factually distinguishable from the restrictions condemned in *Schwinn* and, therefore, that the District Court erred in applying a *per se* rule derived from

to its retailers upon 'condition, agreement or understanding limiting the retailers' freedom as to where and to whom it will resell the products', these sales having been made 'subject to territorial restrictions upon resale'. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 378-379 (1967)." (C.T. 1432-1433).

[20]A panel of the Ninth Circuit had previously affirmed the District Court's judgment by a 2-1 majority in an unreported opinion dated May 9, 1974. That opinion was withdrawn when the Court of Appeals agreed to rehear the case *en banc*.

Schwinn to Sylvania's practice.[21] In reaching this conclusion the majority stressed the established rule that opinions in Sherman Act cases must be read with regard to their particular facts. The Court noted also the absence of any reported decision wherein a locations practice had been held unlawful. By way of contrast, the majority viewed the many cases upholding a manufacturer's right to grant "exclusive dealerships" as persuasive authority supporting a rule of reason inquiry. In its view the antitrust laws were not intended to proscribe practices such as Sylvania's which might promote rather than impede competition. It concluded that Sylvania's locations practice ought to be evaluated by the trier of fact under appropriate rule of reason instructions.

SUMMARY OF THE ARGUMENT

I.

The trial court refused to permit a rule of reason evaluation of Sylvania's locations practice because of its view that this Court's holding in *Schwinn* required *per se* interdiction. The Ninth Circuit rejected that view and for good reason: Sylvania's locations practice differs in both form and effect from the restraints held illegal *per se* in

[21]In light of its holding the Ninth Circuit majority considered it unnecessary to address Sylvania's additional assignments of error, namely, (1) that even if Sylvania's locations practice could be held illegal *per se* under *Schwinn*, Sylvania was wrongfully denied the benefit of, and jury instructions respecting, its "failing company" defense; and (2) that even if this Court's 1967 opinion in *Schwinn* renders a locations practice illegal *per se*, that rule should not be applied retroactively to Sylvania's 1964-1965 conduct.

Schwinn. No purchaser from Sylvania was restricted or confined to a particular territory into which he could sell or deliver Sylvania products; nor was he subject to any restraint upon the customers to whom he might resell. The only restriction was upon the locations at which the purchaser/retailer was franchised. While in theory authorized locations might be so spaced as to preclude effective competition between franchises, there is no showing that any locations practice—be it Sylvania's or some other—has ever been so implemented. Indeed, Sylvania franchised multiple dealers in all relevant market areas including Sacramento. Consumers thus enjoyed a meaningful intrabrand choice as well as the benefits of active interbrand competition.

Reasoned antitrust policy ought to demand that a practice not be categorically rejected as unreasonable simply because of its effects upon one aspect of competition when there is compelling evidence of benefit overall. Such compelling evidence there plainly is: possessing but a small share of the market, Sylvania turned to its locations practice as the singular means for its survival as an interbrand competitive factor in the television market. The interbrand competitive benefits which accrue from the preservation of Sylvania as a viable competitor plainly offset any adverse effects upon intrabrand competition which might result from a diminution in the number of competing dealers handling the Sylvania line. Thus, the Ninth Circuit correctly joined all other courts in holding that a locations practice can be held illegal only after a rule of reason trial in which its competitive purposes and effects are fairly evaluated.

II.

If the holding in *Schwinn* did establish a *per se* rule of such breadth as to invalidate a locations practice, then that holding ought to be reconsidered. On its face the *Schwinn* rule appears questionable because it attaches decisive antitrust consequences to a seeming irrelevancy —the passage of title and risk. In our view, however, the problem runs deeper: the line drawn in *Schwinn* between pre- and post-sale restraints reflects the erroneous assumption that sound antitrust policy ought to give priority to a buyer/dealer's "economic freedom" at the expense of all other antitrust concerns including those of the manufacturer.

In the field of vertical restraints rules ought to be fashioned which further competition while accommodating the interests of manufacturers, distributors and consumers alike. When expansively read the *per se* language in *Schwinn* fails of this goal. Once a manufacturer has made its decision to sell to a dealer, the *per se* language would strip the manufacturer of its "economic freedom" to terminate relationships in the event the dealer were to alter its place of business—whether or not such alteration might adversely impact the legitimate interests of the manufacturer or other dealers in the distribution system. Moreover, an expansive *per se* rule has consequences which appear to be unduly restrictive with respect to interbrand competitive interests and dubious in value from the perspective of intrabrand competition. All competing interests can be fairly balanced under the rule of reason including those which relate to preservation of meaningful intrabrand competition.

Nor is such a result inconsistent with prior authorities invalidating vertical price fixing. As Justice Brennan pointed out in his separate opinion in *White Motor,* restricting dealer discretion with respect to price inhibits the ability of dealers to respond to interbrand competitive conditions as well as intrabrand. Vertical restraints affecting territory have no such dimension.

III.

The uncontradicted evidence established that Sylvania was a "failing company" in the television business when it conceived and implemented its locations practice. Such a showing of economic necessity premised upon imminent business failure establishes a recognized justification for conduct otherwise deemed anticompetitive. Even assuming that a *Schwinn per se* rule was applicable to Sylvania's locations practice, the trial court committed prejudicial error in declining to submit the issue to the jury.

IV.

If this Court were to hold that the *per se* language of *Schwinn* strikes down a locations practice, that holding should not be applied to Sylvania's conduct involving, as it does, events occurring over two years prior to *Schwinn. Schwinn* plainly established a new principle of law. While vertical closed territorial systems had been subject to attack prior to *Schwinn,* courts had uniformly upheld all other vertical distribution restraints including locations practices in situations where neither the manufacturer nor dealer dominated the market. *Schwinn's per se* lan-

guage was both unanticipated and, in the language of Justice Stewart, "a radical change in the law." 388 U.S. at 389. Under the applicable authorities, including *Chevron Oil v. Huson,* 404 U.S. 97 (1971), Sylvania is reasonably presumed to have relied upon the law as it was when it acted. No antitrust policy would be served by penalizing its conduct by the award of a treble damage windfall to petitioners.

ARGUMENT

I.

SYLVANIA'S LOCATIONS PRACTICE SHOULD BE ADJUDGED UNDER THE RULE OF REASON SINCE THAT PRACTICE MATERIALLY DIFFERS FROM THE RESTRICTIONS CONDEMNED IN SCHWINN AND SERVES LEGITIMATE COMPETITIVE INTERESTS.

Sylvania's locations practice was conceived as the singular means for Sylvania's survival in the intensely competitive television market. It was the result of Sylvania's "entrepreneurial choice"[22] of the distribution technique

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[22]See Donald I. Baker, presently Assistant Attorney General, Antitrust Division, Department of Justice, *Vertical Restraints in Times of Change: From White to Schwinn to Where?,* 44 Antitrust L.J., 537, 541 (1975):

> "The antitrust commitment is to free markets, entrepreneurial choice, and consumer sovereignty. This commitment is bottomed on considerations of efficiency—on the belief that in the long run free markets will produce lower costs, lower prices and greater innovation. Yet 'reasonable' restraints have always been allowed, so long as they could be shown to help the competitive process work."

which its executives believed would accomplish that goal. It was further grounded in the notion that competitive market forces precluded Sylvania from achieving even minimal market success without directly involving itself in the characteristics of its dealers. Under compulsion of market forces Sylvania jettisoned three-tiered distribution in its major metropolitan markets in favor of direct manufacturer-retailer sales while adopting criteria for selection of dealers which Sylvania believed maximized its interbrand competitive potential. The criteria thus adopted included consideration of a particular dealer's location in the same way that it included consideration of the dealer's reputation in the community, business methods, and credit standing.

Since Sylvania's locations practice had both the purpose and effect of limiting the number of Sylvania dealers who might engage in intraband competition, those that chose to participate were not authorized to transship merchandise to nonapproved locations at which they might hold themselves out as Sylvania dealers. In this respect Sylvania's locations practice may be said to have imposed "restrictions". But the existence of such 'restrictions' simply frames the pertinent question; it does not answer it. That question is: does a locations practice such as Sylvania's invariably have such a "pernicious effect upon competition" without potential "redeeming virtue" so as to warrant *per se* condemnation without trial court evaluation of the purposes which prompted its origination and the effects which flowed therefrom in the marketplace? See *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958); *White Motor Co. v. United States*, 372 U.S. 253,

262 (1963).[23] Sylvania submits not. To the contrary, it is Sylvania's contention that a *per se* rule is inappropriate on the basis of this record and that the Ninth Circuit majority was correct in its holding that Sylvania was entitled to have its distribution practice evaluated by the trier of fact under the rule of reason.

A.

Sylvania's Locations Practice Differs Materially From the Restraints Held Unlawful in Schwinn

Prior to World War II vertical distribution restraints were uniformly upheld as lawful even if those restraints entailed a complete foreclosure of intrabrand competition. However, commencing in 1948 the Department of Justice, in announced reliance upon *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), began to challenge as illegal *per se* vertical territorial and customer restrictions which totally foreclosed intrabrand competition. While succeeding years brought a number of consent decrees, it was not until *United States v. White Motor Co., supra*, that the Department's theory was judicially tested. It failed the test. Reversing summary judgment in favor of the Government, this Court stated that "[w]e need to know more than we do about the actual impact of these arrangments on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' . . . and therefore should be classi-

[23]Indeed, in *Schwinn* itself, this Court, before reaching its partial *per se* result, stated that "[o]ur inquiry is whether, assuming nonpredatory motives and business purposes and the incentive of profit and volume considerations, the *effect upon competition in the marketplace is substantially adverse.*" 388 U.S. at 375. (Emphasis added.)

fied as per se violations of the Sherman Act." *White Motor Co. v. United States, supra,* 372 U.S. at 263.

Four years later the Department's claims against Schwinn were considered by this Court. But its theory of illegality had changed: although again challenging vertical restrictions entailing closed territories, the Department did not urge that those restrictions were unlawful *per se.* See Jurisdictional Statement of United States at 14. To the contrary, in its Brief the Government affirmed that its position before this Court was based on the rule of reason. Brief for the United States at 21-23. See 388 U.S. at 368, 373.[24] Be that as it may, this Court's resulting opinion in *Schwinn*—which applies both the rule of reason and a rule of *per se* illegality to differing aspects of Schwinn's distribution system—necessarily serves as the point of departure for evaluation of Sylvania's locations practice.

The Schwinn system, adopted at a time when it was the nation's second largest manufacturer of bicycles, involved three distinct marketing methods based on the differing roles of the middle-tier distributors:

1. distributors under the so-called "Schwinn Plan" acted as manufacturer's sales agents receiving a commission for obtaining orders for outright sales by Schwinn to franchised retailers;

2. distributors acted as conventional middlemen purchasing merchandise for resale to authorized dealers; and

3. distributors passed merchandise through their warehouses to franchised retailers in consignment or agency transactions.

[24]It is significant that as of this date neither the Department of Justice nor the Federal Trade Commission has brought a case challenging the validity of vertical restraints such as locations practices and exclusive distributorships which do not result in a complete foreclosure of intrabrand competition except where such restraints are allegedly collateral to price fixing or other illegal conduct. The Department, however, has unsuccessfully opposed the authorization of such practices in the decrees following remand in *United States v. Arnold, Schwinn & Co.*, 291 F.Supp. 564 (N.D. Ill. 1968) and *United States v. Topco Associates, Inc.*, 1973-1 Trade Cas. ¶74,391 (N.D. Ill.), *modified* 1973-1 Trade Cas. ¶74,485 (N.D. Ill.), *aff'd*, 414 U.S. 801 (1973).

All methods involved interrelated territorial and customer restraints imposed by contract. At the middle level each distributor was assigned a specific territory and was required to deal only with franchised retailers within that territory under penalty of termination. And at the dealer level Schwinn prohibited franchisees from selling to other retail dealers.

Upon review in this Court, the legality of these restraints was held to turn upon the form of the transactions involved. When the restraints were analyzed in conjunction with the "Schwinn Plan", agency and consignment transactions, they were held valid under the rule of reason. However, when the very same restraints were analyzed as an incident to the conventional middleman sales transactions, *per se* illegality followed by reason of "the ancient rule against restraints on alienation." 388 U.S. at 380. This Court said:

> "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. *White Motor, supra; Dr. Miles, supra.* Such restraints are so obviously destructive of com-

petition that their mere existence is enough." 388 U.S. at 379.

In terms of the critical distinction thus drawn in *Schwinn,* Sylvania's locations practice plainly falls in the "post-sale" category. But the Sylvania practice differs materially—we submit decisively—in both form and effect from the post-sale restraints held unlawful in *Schwinn.* Unlike the practices considered in *Schwinn,* no purchaser from Sylvania was restricted or confined to a particular territory in which he could sell or deliver Sylvania products; nor was he subject to any restraint upon the customers to whom he might resell.[25] The only restriction was upon the locations at which the purchaser/retailer was franchised—locations which in every relevant market yielded effective competition with other Sylvania dealers as well as others. Thus, if this Court's holding in *Schwinn* is read with particular reference to the contractual territorial arrangements condemned by this Court—arrangements which at the distributor level immunized each unit from all others handling the same brand—the holding is plainly inapplicable to Sylvania's locations practice.[26]

[25]This fact puts an end to petitioners' arguments based upon the customer restraint aspects of this Court's holding in *Schwinn.* (See Pet. Br. 33-4). It was the territorial implications of a locations practice—and those implications alone—which prompted the *per se* jury instructions given below. See Conclusions of Law quoted *supra,* at 23-24 n. 19.

[26]The reading accorded the language and holding of *Schwinn* is a matter of considerable uncertainty. For example, concurring in *Albrecht v. The Herald Co.,* 390 U.S. 145 (1968), Mr. Justice Douglas, who was with the majority in *Schwinn,* noted that *Schwinn* was decided on the basis of a record which "elaborately sets forth information as to the total market interaction and interbrand competition, as well as the distribution program and practices" there challenged, 390 U.S. at 155-6. Similarly, Chief Justice Burger, dissenting in *United States v. Topco Associates, Inc.,* 405 U.S. 596, 617-18 (1972) read *Schwinn* as a case in which the Court "was proceeding under the 'rule of reason' and not by per se rule." See also Mr. Justice Marshall's pointed omission of vertical territorial restrictions from the category of *per se* violations in *United States v. Topco Associates, Inc., supra,* at 607-608. See generally ABA Antitrust Section, Monograph No. 2, *Vertical Restrictions Limiting Intrabrand Competition* (1977).

This reading is not Sylvania's alone. The difference between a contractual closed territorial system and a locations practice has been viewed as significant by every lower court which has considered the matter, both before and since *Schwinn.*[27] As the Ninth Circuit observed below, there are "no reported cases wherein a location clause

[27]This Court has not had occasion to rule upon the legality of a locations practice. In *United States v. General Motors Corp.,* 384 U.S. 127, 139-40 (1966), the Court declined to rule upon the legality of a locations clause which prohibited Chevrolet dealers from establishing new locations for the sale of Chevrolet vehicles without prior manufacturer approval even though the assertion of illegality was limited to circumstances where the clause was employed to prohibit dealers from selling to discounters for resale. See 384 U.S. at 139-40. In concurring, Justice Harlan expressed the view that "General Motors is not precluded from enforcing the location clause by unilateral action, and I find nothing in the Court's opinion to the contrary." 384 U.S. at 149. On remand the District Court adopted Justice Harlan's view and entered a final judgment which expressly stated that its injunctive provisions shall not "be construed to enjoin General Motors from acting unilaterally under any Chevrolet franchise agreement or from unilaterally enforcing any such agreement [including the locations clause]" except for a remedial six months' prohibition relating to sales to discounters. *United States v. General Motors Corp.,* Civil No. 62-1208-CC (S.D. Cal., August 17, 1966). Locations clauses were also involved in *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972), but the agreement there held unlawful was horizontal rather than vertical in character. Moreover, on remand the District Court expressly sanctioned the right of Topco Associates, Inc. to fix the locations of the trademark licensees except where doing so would achieve or maintain territorial exclusivity. *United States v. Topco Associates, Inc., supra,* 1973-1 Trade Cas. ¶74,391, ¶74,485. The District Court's judgment as thus entered was challenged on appeal here but summarily affirmed over Justice Douglas's dissent. 414 U.S. 801 (1973).

has been struck down for illegality." (Pet. Cert. App. A. 26-27). By contrast, several cases have held such practices subject to the rule of reason and lawful thereunder. The decisions range from *Boro Hall Corp. v. General Motors Corp.*, 124 F.2d 822 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943) through *Kaiser v. General Motors Corp.*, 530 F.2d 964 (3d Cir. 1976), *aff'g*, 396 F.Supp. 33 (E.D. Pa. 1975); and *Salco Corp. v. General Motors Corp., Buick Motor Division*, 517 F.2d 567 (10th Cir. 1975) to the Ninth Circuit Opinion here.[28] Commentators in the antitrust field have also viewed locations practices as different from the *Schwinn* restraints and have urged that such practices be judged under the rule of reason.[29]

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[28]Petitioners' reading of these authorities is peculiar at best (Pet. Br. 46-47). As they view the matter, these authorities are distinguishable because they involve "location franchises" which do not restrict a franchisee from shipping merchandise to a non-franchised location for resale. Not only is such a distinction unsupported by the text of these opinions, it is, as the Ninth Circuit majority put it, "highly artificial and even spurious". (Pet. Cert. App. A. 30, fn. 22). Franchising by location as utilized in modern product distribution means nothing if it does not entail express or implied limitations upon the authority of the retailer to transship merchandise to an unauthorized location for resale under the brand name whatever the particular trade style of the store. The Sylvania locations practice, like that in *Kaiser* and *Salco*, was a product of agreements expressly authorizing the dealer to sell and display products bearing the manufacturer's name. Such authorization was the primary purpose of the franchise. Indeed, it is by the dealer's sale, advertising and display of the manufacturer's line that he effectively holds himself out as an authorized dealer. (See Pet. Cert. App. A. 30-31, fn. 22.) Continental itself recognized these truths when it requested Sylvania's formal approval of its Sacramento location as a Sylvania outlet.

[29]See, *e.g.*, Robinson, *Recent Antitrust Developments—1974*, 75 Colum. L. Rev. 243, 276 n. 207 (1975); Jentes, *Permissible Vertical Restraints in Manufacturer-Distributor Relations*, 8 A.B.A. Antitrust Law Notes 97, 102 (Summer 1972) (locations clause stated to be, not only lawful, but the preferred type of manufacturer distributional restraint after *Schwinn*); Hanson, *American Bar Association Symposium on Marketing and Franchising: Antitrust Prognosis for the 70's*, 39 Antitrust L.J. 502, 516 (1970); McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal*, 37 Antitrust L.J. 137, 144-5 (1968) ("A necessary element of the right to 'franchise' . . . is the right to have a 'location clause'."); Pollock, *Alternative Distribution Methods After Schwinn*, 63 Nw. U.L. Rev. 595, 603-4 (1968). Additionally, all law review notes to date concerning this proceeding have favored a rule of reason approach to Sylvania's practices. See 88 Harv.L.Rev. 636 (1975); 26 Mercer L.Rev. 629 (1975); 53 N.C.L.Rev. 775 (1975); 53 Tex.L.Rev. 127 (1975); 49 N.Y.U.L.Rev. 957 (1975).

The distinction is additionally reflected in the numerous lower court judgments applying the rule of reason to other vertical marketing techniques which, like a locations practice, involve "restraints" upon distributors which may inhibit or reduce intrabrand competition and the capabilities of distributors to undertake sales activities in remote areas. See, *e.g.*, *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973) (primary responsibility clause obligating distributor to concentrate efforts in a specified geographical area upheld); *Superior Bedding Co. v. Serta Associates, Inc.*, 353 F.Supp. 1143 (N.D. Ill. 1972) (profit passover arrangement requiring dealer who makes sales within the territory of his neighbor to compensate the latter for promotional efforts, good will and the like upheld); *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972) (obligation to carry full or representative line upheld).

Petitioners dismiss the distinctions between the *Schwinn* type closed territorial system and Sylvania's locations practice as "whimsy" (Pet. Br. 32). As they would have it, any vertical distribution restraint is encompassed within the *per se* holding of *Schwinn* if that restraint is theoretically capable of producing economic effects which approximate Schwinn's closed system (Pet. Br. 31-35). A locations practice has such theoretical potential, petitioners argue, since the practical economics of the television industry precludes extensive marketing activities more than 25-50 miles beyond a particular location. It is thus possible, so the argument runs, for a manufacturer to set up a distribution system which, by virtue of the careful selection of authorized locations and the operation of economic forces, effectively precludes intrabrand competition.

This argument is flawed in several respects. First, even standing alone, petitioners' postulated model differs significantly from the *Schwinn*-type closed territorial restraint. It assumes that intrabrand competition is inhibited, not by contractual compulsion, but by economic limitations inherent in marketing. That difference alone justifies a fresh assessment of a locations practice under *Schwinn* based upon a reasoned evaluation of the purpose of the *Schwinn* holding.

Moreover, petitioners' model is a mere caricature: it has no analog either to Sylvania's distribution system or any other of which we are aware. Sylvania always authorized more than one franchise location in every market area relevant to this litigation, including Sacramento. So far as this record is concerned, there is no evi-

dence that any locations practice has ever been implemented in a manner materially differing from Sylvania's. To the contrary, reason suggests that locations practices are generally employed in product lines where distribution is so dense as to render exclusive territories undesirable or unworkable.

Most important, however, petitioners' analysis simply fails to accommodate the fact that other vertical practices with at least equally inhibiting impact upon intrabrand competition are regularly tested and upheld under the rule of reason. Foremost among these is the traditional "exclusive distributorship"—a marketing technique which, in terms of competitive purpose and effect, may be "much more restrictive of competition than Sylvania's location clauses." (Opinion, Pet. Cert. App. A. 37). Yet the legality of "exclusives"—at least when the arrangements involve an agreement by the manufacturer not to authorize any competing distributors to sell its product within a specified exclusive territory—was recognized in *Schwinn* itself. 388 U.S. at 376.[30] In fact, there is, as the opinion below properly notes, "a veritable avalanche of precedent to the effect that, absent sufficient evidence of monopolization, a manufacturer may legally grant such an exclusive franchise, even if this effects the elimination of another

[30] In *Denver Union Stock Yard Co. v. Producers Livestock Marketing Ass'n*, 356 U.S. 282 (1958), the Supreme Court held that stockyard regulations which barred market agencies from doing business in any other yard were unreasonable and discriminatory within the meaning of the Packers and Stockyards Act, 42 Stat. 159 (1921), 7 U.S.C. §181 *et seq.* In the opinion for the Court Justice Douglas observed:

> "The institution of the exclusive agency is, of course, well known in the law; and the legal problem here would be quite different if the Act envisaged stockyards as strictly private enterprise." 356 U.S. at 288.

distributor."[31] (Pet. Cert. App. A. 37 and cases there cited.) These cases stand for the proposition that distributional efficiency is a legitimate interbrand competitive goal which may be furthered by restrictions in manufacturer-distributor dealings so long as the restrictions are reasonably circumscribed by that end.[32]

Petitioners would dismiss the exclusive dealing precedents on the grounds that they involve only self-imposed inhibitions upon a manufacturer's own sales decisions

[31]These authorities dispose of the suggestion implicit throughout petitioners' argument that the legality of Sylvania's locations practice and its enforcement with respect to Continental might turn upon the fact that Sylvania allegedly acted in response to "complaints" by Handy Andy in Sacramento. If Continental acted in breach of its understandings with Sylvania and in derogation of a lawful locations practice, Sylvania's entitlement to terminate was established regardless of any favored dealer's urgings. See *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). See also *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); and *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F.Supp. 899 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957), in which courts refused to grant relief to automobile dealers whose dealerships had been eliminated because their larger competitors demanded and received from the manufacturer as a condition of continued distribution of the manufacturer's products, an exclusive dealership and agreement to terminate the plaintiffs. See also, *e.g.*, *Beckman v. Walter Kidde & Co., Inc.*, 316 F.Supp. 1321 (E.D.N.Y. 1970), *aff'd*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972): ("But it is well settled that exclusive franchises in non-monopoly lines of commerce are permissible . . . even if they result in cutting off other distributors.") 316 F.Supp. at 1327; *Top All Varieties Inc. v. Hallmark Cards Inc.*, 301 F.Supp. 703 (S.D.N.Y. 1969) (plaintiff failed to state claim when he alleged that Hallmark refused to supply its line to a new, additional store location pursuant to an agreement with another dealer). Compare also Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv.L.Rev. 795 (1962).

[32]For a discussion of the effects of exclusive franchises upon competition, see, *e.g.*, Scherer, *Industrial Market Structure and Economic Performance* 541 (1970).

rather than resale restrictions upon "independent traders" (See Pet. Br. 43-4, echoing the theme advanced in Judge Browning's dissent below, Pet. Cert. App. A. 88-90.)[33] This formulation, however, merely begs the question. For the issue is not whether these precedents *can be* so interpreted, but whether they *should be*. If, as a matter of antitrust policy, the limiting effects upon intrabrand competition resulting from exclusive distributorships is recognized and accepted, why, at the same time, should the law be interpreted in an artificial and one-sided way so as to render such practices meaningless? As Professor (and former Assistant Attorney General) Donald Turner has observed:

> "The point is very simple: If I set up as a dealer in Baltimore and I don't want any more dealers in Balti-

[33]With respect, Judge Browning's dissent below ignores the reality of distributor bargaining power in its analysis of the issue. In modern American commerce, retail chains often possess equal or greater bargaining power than that possessed by the manufacturer, particularly when, like Sylvania, the manufacturer is struggling to obtain a meaningful share of the market, *cf.* Baker, *Vertical Restraint in Times of Change: From White to Schwinn to Where?*, 44 Antitrust L.J. 537 (1975). Judge Browning—like petitioners—would derive a *per se* rule from an unsubstantiated model in which the manufacturer is invariably supreme in "imposing" its contractual will upon its seemingly hapless dealers. However, petitioners' own conduct in conjunction with the Young Bros. incident belies the efficacy of both the model and the analysis. For the Young Bros. incident in June 1965—before Continental's involvement in Sacramento and before product shortages in the fall of 1965 made all television lines indiscriminately desirable—evidences Continental's conviction that its localized market power endowed it with sufficient "muscle" to "coerce" Sylvania into acceding to its wishes respecting enfranchising new dealerships. While Continental proved unsuccessful in this endeavor, the vignette suggests that the "normal populist assumption" that the "large manufacturer" possesses the power to "coerce" local dealers in terms of marketplace decisions is inapplicable to the television industry in general and to struggling manufacturers in that industry in particular. The actual situation appears to have been one of "give and take" bargaining

more, the only way that I can make that stick is to tell the Washington dealer that he can't set up an establishment in Baltimore." *1968 Antitrust Law Symposium of the New York State Bar Association,* at 61.

Further, the suggestion that exclusives be treated as a "one-way" inhibition upon manufacturers ignores the practical effect of such analysis. If a manufacturer may lawfully be precluded from opening other dealers within an "exclusive" territory (which petitioners concede), that inhibition necessarily forecloses any other *prospective* dealer from obtaining such a franchise. Compare Pollock, *The Schwinn Per Se Rule: The Case for Reconsideration,* 44 Antitrust L.J. 557, 570-71 (1975). Viewed from that perspective, the "exclusive" is not a one-way limitation *against* manufacturers, but a one-way limitation *in favor of* already established dealers who alone would benefit from petitioners' suggested interpretation.[34]

Finally, it is plain that both the competitive purposes and effects of distribution systems employing exclusive dealing arrangements are similar to—if not more restric-

[34]Again to quote Mr. Turner, "[T]he ideal arrangement is where [the exclusive] is at the option of the manufacturer, that is, where of his own free will, at a particular point, he chooses to sell to only one person in a particular territory, but remains free of any contractual commitment to continue that for any length of time. I say this because in this whole area one of the things you have to fear is that the distributors will be initiators of these restraints, and by and large their interests are likely to be simply anti-competitive and against the consumer's interest." *1968 Antitrust Law Symposium of the New York State Bar Association, supra,* at 62. In this connection it should be noted that Continental, in opposing Sylvania's franchising of Young Brothers in San Francisco, unsuccessfully attempted to convert Sylvania's locations practice, from one in which Sylvania made decisions on additional dealer locations into a more restrictive practice by which such decisions would be subject to Continental's veto of competition unacceptable to it. See *supra,* at 15.

tive than—those involving locations practices. The whole point of exclusives, after all, is to further interbrand competitive capabilities by providing select dealers with territories substantially insulated from intrabrand competition. As *Schwinn* itself recognizes, the exclusive dealing practice is subject to the rule of reason because it, like a locations practice, can serve legitimate pro-competitive interests. While the party subject to the "restraint" might be said to differ, a locations practice possesses the same pro-competitive potential as "exclusives"—a potential fully realized on the evidence adduced here. The mere identity of the contracting party "restrained"—be it manufacturer or distributor—informs not at all when the inquiry is directed to the effect of the practice upon competition.

It comes to this: the pertinent legal authorities, both before and after *Schwinn,* provide no warrant for striking down a locations practice on a *per se* basis. On the contrary, absent rigid compartmentalization of a distribution system into separate units effectively isolated from all intrabrand competition,[35] lower courts have consistently and properly evaluated the purpose, scope and effect of vertical restraints under the rule of reason. To invalidate a locations practice on the authority of *Schwinn* would be a mechanical extension of the *Schwinn* holding

[35]Vertical "closed territory" practices have been held unlawful under *Schwinn* in such cases as *Adolph Coors Co. v. FTC,* 497 F.2d 1178 (10th Cir. 1974), *cert. denied* 419 U.S. 1105 (1975); *Copper Liquor, Inc. v. Adolph Coors Co.,* 506 F.2d 934 (5th Cir. 1975); *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894 (5th Cir.), *cert. denied,* 412 U.S. 923 (1973); *cf. Noble v. McClatchy Newspapers,* ..... F.2d ..... (9th Cir. 1976) (*pet. for cert. filed* July 27, 1976) (No. 76-86); *Reed Brothers, Inc. v. Monsanto Chemical,* 525 F.2d 486 (8th Cir. 1975), *cert. denied,* ..... U.S. ..... (1976).

without a clear demonstration that the proscribed practice is anticompetitive. See Elman, *"Petrified Opinions" and Competitive Realities,* 66 Colum. L.Rev. 625, 627 (1967). The result might well be to throttle competition *(cf.* Pet. Br. 32), rather than to further it.

B.

Sylvania's Locations Practice Serves Legitimate Competitive Interests Without Appreciable Detriment and Is Therefore Entitled to Be Adjudged Under the Rule of Reason.

Sylvania's locations practice is similar to that which manufacturers in "specialty" or "shopping goods" have turned to in the last several decades for the purpose of maximizing distributional efficiency.[36] While various techniques have been employed, marketing systems centering around the sale of products connected with recognized trade names have often utilized franchise agreements which, to a greater or lesser extent, subject the dealer or retailer to various controls over his business operations. Such controls include in addition to locations restrictions such diverse practices as best efforts clauses, area of primary responsibility covenants, prohibitions against misrepresentations, full or representative line obligations, and duties respecting warranties. All further legitimate interests of the manufacturer by enhancing the quality and

[36]See, *e.g.,* Senate Select Committee on Small Business, 92 Cong., 1st Sess., Report on the Economic Effects of Franchising (Comm. Print 1971); E. Lewis & R. Hancock, *The Franchise System of Distribution* (1963); *Franchising,* a Federal Trade Commission Staff Report on Legal Problems in Connection with Franchise Agreements, December 10, 1969 (1969 Trade Reg. Rep. 444, December 15, 1969, Supp.); Zeidman, *The Growth and Importance of Franchising—Its Impact on Small Business,* 12 Antitrust Bull. 1191 (1967).

effectiveness of the manufacturer's distribution system,[37] thereby maximizing interbrand competitive potential.[38]

While such controls plainly enhance the interbrand competitive capabilities of manufacturers, they also offer significant benefits for dealers. This is particularly true with respect to those which have a territorial dimension. Indeed, the very existence of vertical restrictions may reflect the fact that retailers have bargained for competitive "spacing" as a *quid pro quo* for their willingness to carry the line and subject themselves to various operational controls. See Scherer, *supra,* at 510; Baker, *supra,* at 542. Such "spacing" is avowedly designed to provide each dealer with sufficient security from intrabrand "flooding" so as to recompense him for the investment of time, energy and money necessary to carry and promote the product line. As a consequence, the dealer's ability to retain a position as a viable independent part of the American economic system is enhanced. See, *e.g.,* Justice Stewart's concurring and dissenting opinion in *Schwinn,* 388 U.S. at 386-7.

[37]See *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors Ltd., supra,* 416 F.2d at 80: "A manufacturer or supplier has a legitimate interest in the quality, competence, and stability of his distributors."

[38]Distributional efficiency is not the only basis for these restrictions. The modern consumer economy now demands that the manufacturer assume direct responsibility for product safety and quality irrespective of whether the dealer from which the consumer purchases is "authorized" or has title to the goods at the time of purchase. For example, under California's Song-Beverly Consumer Warranty Act a manufacturer of consumer goods for which the manufacturer makes express warranties is obligated to provide sufficient service and repair facilities in the state to carry out the terms of such warranties or be liable to every retail seller of such goods who gives effect to express warranties whether or not such retailer be "franchised". See California Civil Code §1790 *et seq.*

With particular reference to a locations practice such as Sylvania's, these benefits are not offset by significant adverse effects upon intrabrand competition. While a locations practice limits the number of competitive units selling products in a particular market area, the practice demonstrably does not foreclose consumers from substantial choice among competing dealers. As a consequence, any dealer who might become inclined to charge too high a price or to provide poor service is always subject to an intrabrand competitive check—a check heightened here by the fact that Sylvania at all times reserved the right to franchise additional dealers free of any "veto power" at the dealer level. At most, therefore, intrabrand competition is limited, not eliminated.

When viewed in the round—both in terms of the evidence at trial and the available tools of economic analysis—a locations practice such as Sylvania's must be perceived as potentially pro-competitive in "net effect" and thus an inappropriate subject for *per se* interdiction. As analyzed in Note, *supra,* 88 Harv.L.Rev. at 641:

> "In sum, location restrictions such as Sylvania's encourage dealers to carry and promote the manufacturer's product, thus strengthening its competitive position against other brands on the market. At least where the product is new or has a low market share, location restrictions may thereby produce gains in interbrand competition. Moreover, the anticompetitive effect of limiting intrabrand competition is not likely to be significant where a manufacturer has only minimal market power, since intrabrand competition provides a check on the dealers' price levels. Therefore, location restrictions may often produce net benefits for competition. Even so, reduction of

> investment risk and imposition of efficient scales of operation is not considered to be a sufficient justification for horizontal market division agreements. However, vertical arrangements do not create the same danger that output will be restricted, artificially raising prices and profits. Generally a manufacturer would prefer the lowest retail price possible, once its price to dealers has been set, because a lower retail price means increased sales and higher manufacturer revenues. Thus, vertically imposed location restrictions which limit intrabrand competition will presumably serve to increase distributional efficiency. Accordingly, vertical location restrictions should not be illegal per se. (Footnotes omitted.)"[39]

Finding themselves without a substantial economic basis for *per se* condemnation of a locations practice, petitioners argue that an expansive *per se* rule is nonetheless incumbent by reason of concerns over judicial efficiency and competency. A rule of reason inquiry, it is said, would impel the Court to "set sail on a sea of speculation" (Pet. Br. 39) in the hopeless task of resolving a "nonjusticiable issue" (Pet. Br. 26). Moreover, petitioners argue that *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972), precludes a rule of reason assessment of possible benefits to interbrand competition as a basis for

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[39]For other analyses of the economic effects of various vertical restrictions, see, *e.g.,* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions,* 75 Colum.L.J. 282 (1975); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 75 Yale L.J. 373, 430-453 (1966); Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath,* 81 Harv.L.Rev. 1419, 1426-33 (1968); Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards,* 30 Law & Contemp. Prob. 506, 511-12 (1965). See also the trial court testimony of Lee E. Preston, Jr. (R.T. 2872-2970; A. 401-474).

sanctioning "certain harm" to intrabrand competition (Pet. Br. 39-41).

But concern over judicial efficiency is no substitute for reasoned antitrust policy—policy which ought to demand that a practice not be categorically rejected as unreasonable simply because of its effects upon one aspect of competition where there is compelling evidence of benefit overall. See Note, *supra,* 88 Harv.L.Rev. at 642.[40]

Nor does *United States v. Topco Associates, Inc., supra,* compel a contrary view. *Topco* involved horizontal territorial and related restraints—practices with respect to which "net competitive damage" is reasonably predictable. It is otherwise in a vertical context. When, as here, a manufacturer has joined with its distributors to form a distribution system engaged in an economic battle with competing brands, "it is myopic to concentrate only on the possible diminution of *intra*-brand competition and ignore the advantages to *inter*-brand competition. Elementary cost-benefit analysis would seem to require consideration of the *net* competitive effect of a vertical restriction—and not merely the effect on one side of the balance sheet." Pollock, *supra,* 44 Antitrust L.J. at 568 (emphasis in original). (See also Opinion, Pet. Cert. App. A. 45-6).

But the ultimate repudiation of petitioners' argument —particularly when directed at judicial competency—is

[40]In this connection, we commend to the Court the comment of Circuit Judge Duniway, dissenting below:

> "I cannot, however, refrain from making one small observation. I am puzzled by the notion that because the courts are not very well equipped to decide between conflicting notions of economic policy, they should pick one side of such an argument and erect it into a rule of per se illegality." (Pet. Cert. App. A. 114).

found in *Schwinn* itself. For there this Court affirmed the trial court's finding that Schwinn's restrictions were lawful under the rule of reason as respects "Schwinn Plan", consignment and agency arrangements. After referencing such facts as the availability of competing lines and the absence of exclusive dealing and price fixing practices, Mr. Justice Fortas stated:

> "[W]e cannot disagree with the findings of the trial court that competition made necessary the challenged program; that it was justified by, and went no further than required by, competitive pressures; and that its net effect is to preserve and not to damage competition in the bicycle market. Application of the rule of reason here cannot be confined to intrabrand competition. When we look to the product market as a whole, we cannot conclude that Schwinn's franchise system with respect to products as to which it retains ownership and risk constitutes an unreasonable restraint of trade." 388 U.S. at 381-2.

To be sure, a rule of reason trial may encounter difficult problems of proof and evaluation. But such problems are no different in kind from those encountered in resolving other questions under the antitrust laws such as whether a conspiracy has occurred or whether there has been an attempt to monopolize, not to mention assessment of damages. All arguably involve matters of "unfathomable economic complexity" (Pet. Br. 42), but all have been routinely confronted by the Justice Department and private claimants alike without trepidation or paralysis. Given this experience, petitioners' assertion that "it is impossible to tell whether conceded elimination of intrabrand competition in fact has off-setting pro-

competitive interbrand effects" (Pet. Br. 26) should be viewed as nothing more than a confession of evidentiary poverty.[41]

There remains only petitioners' claim that *per se* interdiction of a locations practice would further the goal of certainty or predictability in commercial relationships between manufacturers and dealers (Pet. Br. 41-2). That claim, however, proves nothing or everything. It proves nothing because the goal of predictability or certainty can be equally accomplished by a clear holding that a locations practice is presumptively lawful under the rule of reason, as petitioners themselves acknowledge with re-

[41]Contrary to petitioners' argument (Pet. Br. 42-49), the availability *vel non* of "less restrictive alternatives" provides no analytical assistance in determining whether a *per se* rule ought to apply to a challenged trade practice. Were it otherwise, it is probable that all vertical distribution techniques would be invalidated since "there will almost always be a less restrictive alternative, and indeed, further alternatives to each alternative *ad infinitum*." Handler, *Twenty-five Years of Antitrust* (25th Annual Antitrust Review) 73 Colum.L.Rev. 415 (1973). To the extent that the "less restrictive alternative" notion is pertinent at all, it is only after the rule of reason is deemed applicable. For then the "less restrictive alternative" formulation becomes "a verbal variant of the traditional rule of reason inquiry into whether a restraint of trade is reasonably necessary to accomplish a legitimate objective and therefore lawful despite its anticompetitive effect." Robinson, *Recent Antitrust Developments: 1975*, 76 Colum.L.Rev. 191; 232 (1976). Even under the rule of reason, however, the pertinence of alternatives is limited. As Judge Adams stated in *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975), it would be error to conclude "that, regardless of the other circumstances present, the availability of an alternative means of achieving the asserted business purpose renders the existing arrangement unlawful if that alternative would be less restrictive of competition no matter to how small a degree." Any other rule "would place an undue burden on the orderly conduct of business." It is also worth noting that this Court in *Schwinn* made no reference to the "less restrictive alternatives" notion in any part of its analysis. Finally, it is doubtful at best that the alternatives to which petitioners advert are actually "less restrictive" than a locations practice.

spect to such vertical arrangements as exclusive distributorships (Pet. Br. 42). It proves everything because its logic compels that all trade practices be peremptorily outlawed or sanctioned thereby dispensing with the rule of reason entirely.

However desirable certainty or predictability, such concerns ought not to deflect the Court from the proper focus of inquiry: is the practice in question so invariably pernicious in terms of its competitive purposes and effects as to warrant outright condemnation? If not, the practice should be subject to a rule of reason scrutiny. While the result might be a few more trials, that is scarcely a detriment which warrants condemnation of potentially legitimate business practices.

II

IF THE HOLDING IN SCHWINN ESTABLISHED A PER SE RULE WHICH INVALIDATES LOCATIONS PRACTICES, THEN SCHWINN OUGHT TO BE RECONSIDERED.

A.

Schwinn's per se language unduly inhibits the legitimate interests of manufacturers in the selection of their product distribution systems.

This Court's opinion in *Schwinn* has been the subject of more intense scrutiny and criticism than any other recent decision in the antitrust field.[42] Most of this criti-

[42]A compendium of critical comments appears in the opinion below (Pet. Cert. App. A. 18, fn. 13). The Court's attention is also invited to two articles appearing since the decision below: Baker, *Vertical Restraints in Time of Change: From White to Schwinn to Where?*, 44 Antitrust L.J. 537 (1975) and Pollock, *The Schwinn Per Se Rule: The Case for Reconsideration*, 44 Antitrust L.J. 557 (1976).

cism has centered upon the invocation of "the ancient rule against restraints on alienation" as the underpinning for the *per se* rule there announced and upon the important legal distinctions which were made to turn on the form as opposed to the competitive consequences of the challenged transactions. As observed by a recent article in the Columbia Law Review:

> "The hue and cry engendered by *Schwinn* was readily understandable. In striking down post-sale restrictions as necessarily violative of section 1, the Court did not simply abruptly end its short-lived search for 'the economic and business stuff out of which these arrangements emerge;' it also swept aside a venerable body of law sustaining such restraints under the traditional rule of reason as legitimate means for fostering effective interbrand competition. Even more perplexing, the Court predicated its new prohibition on a theoretical doctrine which Justice Stewart tersely characterized in his dissent as 'a wooden and irrelevant formula'—the so-called 'ancient rule against restraints on alienation.' Curiously enough, this 'ancient rule' had not even been mentioned in *White Motor,* except for a passing reference by Justice Brennan in his concurring opinion, and then only to emphasize that the mere existence of restraints on alienation should not conclusively establish illegality. Moreover, since it is doubtful that an undeviating rule against such restraints ever existed, even at common law, the jurisprudential underpinnings of *Schwinn* were anything but sturdy." Robinson, *Recent Antitrust Developments: 1974,* 75 Colum. L. Rev. 243, 270-271 (1975). (Footnotes omitted.)[43]

[43]For further criticisms of Justice Fortas' reliance upon the "ancient rule", both in terms of its common law origins and its irrelevance to competitive concerns under the Sherman Act, see

To similar effect, Professor (now Assistant Attorney General, Antitrust Division) Donald Baker has noted that:

> "[t]he root error in *Schwinn* is that everything turns on the bare form of the transaction. Is it a 'sale'? Is it a 'consignment'? Is it something else—such as a sale subject to a continuing equitable interest or a security right? If it is one thing, the rule seems too tolerant of intrabrand restraints. If it is another, the rule is probably too rigid and inflexible." 44 Antitrust L.J. at 538.

These criticisms themselves suggest a sufficient basis for reexamination of *Schwinn's per se* language. However, Sylvania submits that both the holding in *Schwinn* and its rationale derive from a more fundamental error, namely, the Court's apparent designation of dealer sovereignty as the overriding antitrust value in vertical distribution relationships. Stated otherwise, *Schwinn's* premise is that sound antitrust policy must give priority to the decision-making integrity of dealers who have taken the economic risk that they will be unable to market their products successfully. See generally Averill, *Sealy, Schwinn and Sherman One: An Analysis and Prognosis,* 15 N.Y.L.F. 39, 64 (1969).

As viewed by the *Schwinn* majority, to the extent Schwinn's dealers had purchased bicycles and thereby assumed the risk that they would remain unsold, they

Handler, "The Legality of Exclusive Representation Agreements and Territorial Provisions Ancillary to Trademark Licensing," Hearings on Exclusive Territorial Allocation Legislation Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 92d Cong., 2d Sess. Pt. II at 906-909 (1972); Handler, *The Twentieth Annual Antitrust Review—1967,* 53 Va.L.Rev. 1667, 1685-86 (1967) and Posner, *supra,* at 295-96.

could not be restricted in any way in their right to "alienate" them. By contrast, where *Schwinn* retained "title, dominion, and risk" that standard yielded to a rule of reason inquiry and a relaxed one at that. See 388 U.S. 380-82. This was true notwithstanding the fact that the competitive impact of the two approaches was substantially identical in the sense of "confining distribution outlets." 388 U.S. at 380. Moreover, the *Schwinn* majority cited with approval the principle that a non-monopolist manufacturer has the right to select its dealers and to refuse to deal entirely—a right presumably countenancing the establishment of a system of geographically spaced exclusive distributors or dealers. Since exercise of this right may result in a distribution system substantially insulated from intrabrand competition, it is scarcely debatable that this Court was concerned with something other (or, at least, in addition to) the mere existence of limitations upon same-brand competition.

The difficulty with this analysis is that while the Court purports to recognize that both manufacturers and dealers have competitively legitimate interests in controlling the nature of their respective businesses, the practical impact of the decision is largely to negate the manufacturer's ability to define and implement a product distribution system of its choosing. This follows from the implicit assumption of *Schwinn* that a manufacturer has no legitimate continuing interest in the distribution of its products after the initial sale or that such interest is, in all events, outweighed by the dealer's interest in unfettered economic discretion. Thus, although the Court refers favorably to a manufacturer's right to select its

dealers in the first instance, the necessary import of the *Schwinn* holding is that once the decision to enfranchise is made it becomes, as a practical matter,[44] largely irreversible (for non-credit reasons) no matter how the nature of the dealer's business or the competitive situation may have changed. *In other words: once a dealer, always (and everywhere) a dealer.* Compare 88 Harv. L. Rev., *supra* at 646.

To illustrate by reference to the facts of the present case (which are said to be controlled by *Schwinn*), it is clear that Sylvania neither needed nor wanted a new

[44]The manufacturer's supposed unilateral right under *Colgate* to "announce in advance" the terms upon which he will deal is at best unrealistic as applied in the present context. See *supra*, at 10, fn.5. The notion that major manufacturers will be able with any frequency to produce evidence of sufficient "Dorie simplicity" (*George W. Warner Co., Inc. v. Black & Decker Mfg. Co., Inc.*, 277 F.2d 787, 790 (2d Cir. 1960)) to satisfy the *Colgate* test challenges common sense as well as experience. This is particularly true in light of the much-expanded notions of "combination and conspiracy" derived from decisions such as *Albrecht v. The Herald Co., supra.* The principal problem with *Colgate* is that it is based upon a postulated business environment which fails to conform to reality. Also, the line between what is permitted and what is proscribed is difficult to ascertain or apply in the ordinary business context. Even for lawyers who regularly practice at the antitrust bar the boundaries of permissible unilateral conduct are elusive and the source of much disagreement. See, *e.g.*, Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962); Panel Discussion, *Refusals to Deal*, 42 Antitrust L.J. 325 (1973). Moreover, unlike the ordinary situation in which reasonably careful planning by corporate officers and their counsel ensures full antitrust compliance, attempted satisfaction of the *Colgate* standard is often undercut by relatively low-level corporate employees, whose transgressions often come to light only after the fact of termination has been accomplished. Not infrequently, a seemingly whistle-clean termination is irretrievably sullied by prior threats communicated to, or assurances received from, the account by a salesman or area manager. See, *e.g.*, R. Pitofsky and K. Dam debating *Is The Colgate Doctrine Dead?*, 37 Antitrust L.J. 772 (1968).

retail outlet in Sacramento. Had some "stranger" approached it with a request to open a Sylvania dealership there, it would have been turned down. However, having franchised Continental to operate in San Jose and other locations, it is now argued that *Schwinn*-based doctrine required Sylvania to continue to deal with it and to supply merchandise for Continental's unwanted Sacramento store.

That, we submit, ought not to be the law. Why should the decision of Sylvania to sell television sets to the "old" Continental for its operation in one location be ossified into an unbounded commitment to deal with the "new" Continental having operations elsewhere? Or, to put the matter another way, why should the entrepreneurial choice of manufacturers be limited to the pre-selection stage? Isn't Sylvania's decision not to accept Continental as a dealer in Sacramento effectively the same decision moved back to a different point in time?

Sylvania submits there is no sound "antitrust" reason for treating the two situations differently. If a dealer elects subsequently to exercise his discretion to change the nature of his operations by, *e.g.*, selling from different locations or to different functional levels of customers, why should the manufacturer (provided price is not in issue and that other competing products are freely available) not be free to exercise, in good faith, its discretion not to deal further with him?

The locations practice which Sylvania utilized here was no more than the necessary corollary to the recognized right of a manufacturer to franchise at certain locations and to deal with certain dealers only. On the other hand,

Continental's decision to open another store was not simply an exercise of a dealer's discretion to determine how best to market its products but rather a fundamental change in the nature and scope of its operations. Given these circumstances, Sylvania submits that it should be every bit as entitled to decline to deal *at that point* as it was when the decision to sell or not to sell was first posed. At the very least, that action should be adjudged by its reasonableness, and not as a *per se* offense.

The fundamental question which should be addressed is not whether a manufacturer may impose restrictions upon the disposition of goods after transfer of title and risk of loss, but rather whether a manufacturer retains a continuing interest in the nature of its distribution system and dealers sufficient to justify a factual inquiry into the purposes and effects of its distribution practices.[45] There is no question that, to the extent Continental had acquired Sylvania merchandise, it was, and should be, free to dispose of it as, how and where it elected. That "sover-

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[45]See Elman, *"Petrified Opinions" and Competitive Realities*, *supra* at 630-31:

> "[I]n a modern economy it is nonsense to say that it is none of the manufacturer's business how his product is marketed to the consuming public; that once he parts with legal title when he sells to the wholesaler or retailer, he has lost the right to participate in the marketing of his product to the consumer. Today's manufacturer not only has that right, but exercises it all the time; and he does so because he is competing, as he must and should, with manufacturers of rival products and brands. Thus, a manufacturer's participation in the marketing of his product at the retail level can be held unlawful, certainly not on the ground that he has no business being there, but only on the ground that, by his actions at the retail level, he is unjustifiably limiting competition."

eignty", however, is far different from the position urged by Continental: that its right of "entrepreneurial choice" guaranteed to it the right to become a retailer of Sylvania merchandise in any market it chose, or to change the nature of its operations without legal objection or response by Sylvania. To the contrary, we submit that due regard for the equivalently important "entrepreneurial choice" of Sylvania as to how best to market its products (for the benefit of itself *and its dealers*) requires, not *per se* interdiction, but evaluation under the rule of reason.[46]

B.

Schwinn's Per Se Language Fails to Promote Either Inter- or Intra-Brand Competition.

Not only is *Schwinn* imbalanced in its premises, but the competitive consequences of the decision are seemingly contrary to those which were intended. The articulated basis of the Court's opinion is that Schwinn's practices were to be evaluated in terms of their "effect" upon "competition in the marketplace". 388 U.S. at 375. Yet, if that be the goal (and Sylvania agrees that it should), both the opinion itself and the experience sub-

[46]Our discussion of *Schwinn* is premised on the assumption that the restrictions in issue are imposed in a competitive market setting and are vertical in nature. As *Schwinn* itself recognizes, the unfettered right of a manufacturer to exercise its "entrepreneurial choice" in selecting dealers and defining its distribution system exists only where other competitive products are freely available. 388 U.S. at 376. Similarly, a manufacturer must act in its own competitive interests and not merely as the agent of a horizontal dealer cartel as in *United States v. General Motors Corp., supra; cf.* also *United States v. Sealy*, 388 U.S. 350 (1967).

sequent thereto[47] suggest that the majority failed to achieve its stated objective in at least three respects.

First, it is largely conceded that whatever their effect upon intrabrand competition at the dealer level, nonprice vertical restraints may, and frequently do, promote interbrand competition. See, *e.g.*, Warren, *Economics of Closed-Territory Distribution*, 2 Antitrust Law and Econ. Rev. 111 (1968); Preston, *supra;* Bork, *supra.* See additionally ABA Antitrust Section Monograph No. 2, *supra.* Indeed, the Court's observation concerning "competition in the marketplace" must be read as referring to intrabrand competition alone since the opinion acknowledges at several points that Schwinn's distribution practices were responsive to its declining market share and the intense competition it faced from mass merchandisers (such as Sears and Montgomery Ward) and the substantially cheaper (*circa* 1962) foreign imports. In fact, so long as title and risk of loss remained with Schwinn this Court was quite willing to approve the competitive reasonableness of the defendants' practices. While concern with dealer sovereignty prevented a similar result in the postsale context, it is surely clear that the interbrand com-

[47]The post-*Schwinn* experience has been summarized by Mr. Robinson as follows:

> "More surprising, however, is the rough treatment accorded the decision by the lower courts. One would ordinarily expect an authoritative determination by the Supreme Court to be followed obediently irrespective of its logical persuasiveness. *Schwinn*, however, has not received such deference. Evidently recognizing that a total prohibition of restraints on alienation would produce unpalatable results, judges have struggled to distinguish or limit *Schwinn* in ways that are a tribute to judicial ingenuity." Robinson, *Recent Antitrust Developments: 1974*, 75 Colum.L.Rev. at 272.

petitive impact of the programs was identical in both instances.

Second, the Court's opinion was obviously motivated by concern for the viability of small business units. However, the consequences of the decision seemingly point in precisely the opposite direction. Assuming *arguendo* that application of *Schwinn* might result in a short term increase in intrabrand competition, the long-run effect of the decision must necessarily be to favor vertical integration and the interests of large manufacturers who can afford to implement and support a true consignment system. See, *e.g.*, Posner, *supra* at 296-7; Baker, *supra* at 538, *Schwinn, supra,* at 386-7 (Stewart, J., concurring and dissenting). In fact, it appears that as a direct result of this Court's decision, Schwinn itself became vertically integrated to a large degree, thereby eliminating many of the very dealers whose protection this Court had sought to promote. See Keck, *The Schwinn case,* 23 Bus. Law. 669, 686-7 (1968); Pollock, *Alternative Distribution Methods After Schwinn,* 63 Nw. U.L. Rev. 595, 610 n. 60 (1968). *Schwinn* similarly militates against use of a three-tiered distribution system at all, since it is obviously safer under that decision to sell directly to pre-selected retailers.[48]

Finally, and of equal importance, there remains a significant question whether even the limitation upon *intra*brand competition which undeniably resulted from

[48]Merely eliminating the distributor level, of course, gives no assurance that a manufacturer will be able to retain the type of distribution system it intends. For example, in *Schwinn* itself, some of defendants' established retailers had, in effect, elected to become wholesalers of Schwinn merchandise, reselling it to retailers with whom Schwinn and its distributors had elected not to deal.

Schwinn's practices warrants a sweeping *per se* rule. At issue in *Schwinn,* after all, was not simply an attempt by the defendants to restrict intrabrand competition at the distributor level but also an effort to prevent certain dealers from taking advantage of the good will previously developed by Schwinn and its other dealers by creating a "second line" of distribution among mass merchandisers and other types of retailers with whom Schwinn did not choose to deal. See 388 U.S. at 368-70. The effect of the Court's decision was that Schwinn was legally precluded from responding to those efforts without adopting a total consignment system or vertically integrating—as it ultimately did.

To posit that this consequence of the *Schwinn per se* language yields increased intrabrand competition misses the point. For the issue, surely, is not the mere enhancement of such "competition", but whether it is the type of competition which, as a matter of antitrust policy, ought to be preserved, particularly when the cost of so doing is injury to other forms of competition. We respectfully suggest that it is not, at least on a *per se* basis. To a not insubstantial degree, the commercial "value" attributable to established product lines is intangible and results from the joint efforts of manufacturers and dealers. Compare Demsetz, *Inconsistencies in Monopolistic Competition,* 80 J. Pol. Econ. 592, 595-6 (1972); Scherer, *supra,* at 327. This is particularly true in a selective or "spaced" distribution system such as Schwinn employed. While the antitrust laws properly recognize the value of "entrepreneurial choice", it is at best questionable whether any true competitive gains are realized by permitting dealers to

reap profits for a relatively short period by "creaming", or taking a "free ride", upon the prior efforts of manufacturers and other dealers to create product identification and good will. See, *e.g.*, Posner, *supra*. Although it is possible to conceive of short-run consumer benefits from such practices, it is almost invariably the case that these benefits, if such they be, endure no longer than the time required for the products in question to be stripped of their appeal. What is more, it is precisely those items which have acquired the greatest consumer desirability (and which thus offer the greatest potential for dealer profit) that are particularly subject to this type of "free ride" abuse.[49]

C

Schwinn's Per Se Language Is Not Compelled By Decisions Forbidding Vertical Price Maintenance.

Petitioners argue at length that the analytical principles applicable to the Schwinn and Sylvania practices are indistinguishable from those applicable to vertical price fixing. Hence, it is said, any decision placing respondent's locations practice in the rule of reason category would necessarily undercut price holdings from *Dr. Miles* forward. (See Pet. Br. 50-52.)

[19]The situation in Sacramento obviously presented the potential for an attempted "free ride" by Continental. See *supra*, at 10-11, 15 fn. 12. Whether that was, in fact, its motive is an issue which need not be resolved in the context of determining whether a *per se* rule properly applies to Sylvania's locations practice. It should be noted, however, that the "free ride" phenomenon need not depend—as Continental argues—upon the existence of super-normal profit-making by existing dealers. That will be the case only where interbrand competition is absent or weak, a situation which neither Schwinn nor Sylvania ever confronted.

It is, of course, true that antitrust scholars, such as Professors Bork and Posner, have suggested that vertical price maintenance may be pro-competitive in many instances. However, this Court has held in *Schwinn* and elsewhere that price and non-price restraints involve discrete antitrust considerations. Were it otherwise, there would have been no basis for the government's separate price claim in *Schwinn;* nor would there have been reason for this Court's extended non-price analysis in that case or in *White Motor* four years earlier. In fact, in the latter action, the District Court apparently accepted substantially the same "price" argument advanced by Continental here only to have this Court disapprove it on appeal. 372 U.S. 253 (1963), *rev'g,* 194 F. Supp. 562 (N.D. Ohio 1961).

Moreover, the distinction between price and territorial vertical restraints is sound in analysis as well as precedent. As Justice Brennan pointed out in his separate opinion in *White Motor,* restricting dealer discretion in the price area inhibits not only intrabrand competition but also the ability of dealers to respond to interbrand competitive conditions. See 372 U.S. at 268. By contrast, under vertical restraints affecting only territory, dealers remain entirely free to lower their prices to meet (or beat) the competition of other dealers.

Also, while non-price distribution restraints may be ancillary to a price maintenance system, that certainly will not be so in every case. Indeed, economic theory suggests that, in ordinary circumstances, a manufacturer will desire intense price competition among its dealers and a low overall price for its goods, thus maximizing demand. Compare, *e.g.*, Posner, *supra,* at 283.

Petitioners' attack also proves too much. While it is certainly true that both the Schwinn and Sylvania practices possess the potential to affect price, the same is true of any form of vertical restraint. Thus, the same charge could be levied with equal force against a system of exclusive distributors. See discussion *supra,* at 39-43. In short, the issue is not the mere potential for price impact but whether in a given case that potential has been realized—something that did *not* occur in either *Schwinn* or the instant case since in each the respective plaintiffs made *and lost* price-fixing claims in the District Court.[50]

D

The Rule of Reason is the Proper Standard For Evaluating Non-Price Vertical Restraints.

In any particular case the various observations noted above may be inapposite to the facts presented. But the reverse will equally be true. And that, we submit, is the point of this discussion and of our suggestion that *Schwinn* should be reconsidered. For *per se* rules are too blunt an instrument to be indiscriminately wielded except when it is clear from both economic theory and abundant practical experience that the consequences of the challenged practice are demonstrably and invariably "pernicious." That simply cannot be said of non-price vertical restraints. Compare, Note, 88 Harv. L. Rev., *supra* at 642; Hearings on H. R. 6684 Before the Subcommittee on Monopolies and Commercial Law of the House Judiciary

[50]Continental's "price" arguments are also beside the point of this case in that its practice was to sell Sylvania products at $50-$100 *above* suggested list. See *supra,* at 13.

Committee, 94th Cong. 2d Sess. (1976) (Statement of Richard Posner).

Indeed, for the reasons noted above, we believe that in a competitive market context a manufacturer's decision concerning the nature of its distribution system should ordinarily be regarded as presumptively lawful—much as exclusive distributorships are regarded under the law at present. Of course, to the extent that such a decision is implemented as part of an attempt to monopolize or is otherwise demonstrated to operate unreasonably, the treble damage sanction remains available.[51] Such unreasonableness, however, should not be presumed as the basis for a *per se* rule which invalidates practices which neither logic nor justice properly condemns.

III

THE TRIAL COURT ERRED IN REJECTING SYLVANIA'S "FAILING COMPANY" DEFENSE AND REFUSING TO INSTRUCT THE JURY WITH RESPECT THERETO.

The uncontradicted evidence establishes that prior to the adoption of its locations practice Sylvania was a "failing company" in the television business.[52] That evi-

[51]Also, manufacturers remain bound by any contractual obligations to continue to deal which they may have assumed as well as by implied covenants of good faith and fair dealing—not to mention by economic self-interest. A rational manufacturer will not lightly terminate a distributor or dealer who is returning substantial profits to him. This is all the more true where it is likely that the terminated dealer will immediately become an outlet for his competitors.

[52]*Supra,* at 5-6. As petitioners misrepresent the clear meaning of Mr. Steiner's testimony, we feel constrained to reemphasize that his testimony was that Sylvania "*would probably* go out of business" if its locations practice did not improve its market position. (R.T. 2543-2544. Emphasis added.)

dence would have permitted the jury to find that Sylvania's adoption of a locations practice was a reasonable and necessary means for enabling it to stay in that business rather than abandon it completely to larger competitors. Similarly, the evidence would have supported a finding that Sylvania's locations practice remained reasonable and necessary in 1965 in view of changing market shares and conditions. At the very least the evidence warranted an inquiry by the trier of fact into these areas.

The notion of economic necessity premised upon impending business failure as justification for conduct otherwise deemed anticompetitive is now firmly fixed in the jurisprudence of this Court. The doctrine originated in the field of mergers or acquisitions (*International Shoe Co. v. FTC,* 280 U.S. 291 (1930)) and has since been recognized by this Court frequently.[53] The *Schwinn* majority itself recognized that there could be exceptions to the *per se* rule of illegality in a case either of "a newcomer,

[53]See *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *United States v. Greater Buffalo Press*, 402 U.S. 549 (1971); *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). See also *Granader v. Public Bank*, 417 F. 2d 75 (6th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970); *United States v. Maryland & Virginia Milk Producers Ass'n*, 167 F.Supp. 799 (D.D.C. 1958), *aff'd in part and rev'd in part on other grounds*, 362 U.S. 458 (1960); Hale and Hale, *Failing Firms and the Merger Provisions of the Antitrust Laws*, 52 Ky. L.J. 597 (1964); Comment, *An Updating of the "Failing Company" Doctrine in the Amended section 7 Setting*, 61 Mich. L.Rev. 566 (1963); Connor, *Section 7 of the Clayton Act: The Failing Company Myth*, 49 Geo. L.J. 84 (1960); Bork, *Merger and the Clayton Act*, 74 Harv. L.Rev. 226 (1960).

seeking to break into or stay in . . . business" or a "failing company." 388 U.S. at 374.[54]

Moreover, the doctrine is not limited to business entities whose every product or every division is failing, as petitioners imply (Pet. Br. 61-63). In these proceedings the Ninth Circuit thought it appropriate to emphasize

> ". . . that even if a manufacturer is prosperous in its whole operation, the failing company defense is applicable if the company is failing in the manufacture and distribution of one of its significant products. In *Schwinn* Mr. Justice Fortas wrote of the 'product market.' 388 U.S. at 382." (Pet. Cert. App. A. 54, fn. 41).

See also *United States v. Reed Roller Bit Co.*, 274 F. Supp. 573, 584 n. 1 (W.D. Okla. 1967) (failing company doctrine recognized as applicable to sale by prosperous parent company of an unprofitable subsidiary).

[54]Even where *per se* rules apply, the lower courts have recognized that such rules operate as a presumption which may be overcome by proof of business necessity comparable to that adduced by Sylvania. See, *e.g.*, *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 506 (1969) ("It may turn out that the arrangement involved here serves legitimate business purposes . . ."). See also *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). As interpreted by the FTC Staff Report on Franchising following in the wake of *Schwinn:*

> "It appears that in *Schwinn* the court left enough leeway in its initial threshhold test of overall reasonableness of vertical arrangements to enable the manufacturer to justify such an arrangement by establishing that *it could not have* entered the market or *expanded its market share because of the impossibility of obtaining dealers willing to handle its products without some territorial protection*, and by showing its inability to finance an effective agency-consignment arrangement." *Franchising*, a Federal Trade Commission Staff Report on Legal Problems in Connection with Franchise Agreements. (Emphasis added.)

The failing company defense, as thus recognized, is grounded in both economic and common sense. As this Court first stated in *International Shoe Co. v. FTC, supra,* the doctrine permits practices which have "the effect of mitigating seriously injurious consequences otherwise probable . . ." 280 U.S. at 302. Congress and this Court have both recognized that the public interest is plainly served when a company is permitted to employ "restrictive" practices essential to its remaining a vital competitive factor in the market.[55]

Assessing whether a company was failing is a task for the trier of fact, *United States v. Diebold, Inc.,* 369 U.S. 654 (1962); *cf. Calnetics Corp. v. Volkswagen of America, Inc.,* 532 F.2d 674 (9th Cir. 1976), *cert. denied,* ..... U.S. ....., 45 U.S.L.W. 3340 (Nov. 9, 1976), and a trial court's refusal to submit the defense to the jury when, as here, the facts so warrant, is grounds for reversal.[56] Thus,

[55]*See Brown Shoe Co. v. United States,* 370 U.S. 294 (1962) for a discussion of congressional intent respecting the "failing company" defense.

[56]Continental concedes that the failing company defense involves a factual inquiry but argues that the evidence is all in its favor (Pet. Br. 61-64). This it does notwithstanding (1) Sylvania's disastrous market position which prompted adoption of its locations practice, (2) the alternative of failure or abandonment of television operations absent a new distribution policy, and (3) the ultimate pro-competitive effects of the locations practice—all summarized *supra,* at 5-7, 10-13. Continental's arguments might have merited this Court's consideration had the issue been presented to the jury and been resolved adversely to Sylvania; but they have no office to play with respect to the trial court's refusal to submit the question after deciding to apply the *Schwinn per se* rule. Continental's disparagement of Sylvania's proposed instruction is simply disingenuous (Pet. Br. 64). It is the trial court's duty to instruct—and to instruct properly—when the evidence so justifies. See *supra,* at 21 fn. 16. Here, the trial court simply declined to give any instruction, however couched.

even assuming that a *Schwinn per se* rule was applicable to Sylvania's locations practice, the trial court's refusal to accord Sylvania the benefit of the failing company defense by giving appropriate jury instructions thereunder was prejudicial error.

IV

IF A LOCATIONS PRACTICE BE HELD ILLEGAL PER SE UNDER SCHWINN, THAT RULING SHOULD NOT BE APPLIED RETROACTIVELY.

Were this Court to hold that *Schwinn* strikes down a locations practice as illegal *per se,* it would be singularly inequitable to apply that ruling retroactively to Sylvania. For in the 1962-1965 period, Sylvania had every reason to believe that its locations practice was subject to the rule of reason and lawful thereunder. To subject Sylvania now to treble damages on a *per se* theory for engaging in acts which were believed lawful when committed would not promote the policy of the antitrust laws. It would yield only a result as unanticipated as it is unjust.

For more than a decade this Court has recognized the inequity of imposing the treble damage remedy for acts which a defendant had no reasonable basis to believe indefensible under the antitrust laws at the time they were committed. Thus, in *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964), this Court recognized the applicability of the nonretroactivity principle in treble damage suits where the equities would warrant only prospective appli-

cation of a newly announced rule.[57] Again, in *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), this Court reaffirmed the viability of the nonretroactivity principle in a case where there was a clear and fundamental change in the law.[58] Thus the nonretroactivity concept has emerged "as a commonsense and pragmatic response by the Court to a significant but surmountable conceptual difficulty," namely, that courts do make and change law and in the course of doing so "there is no need to disturb matters already settled, so long as those potentially affected by the new or changed rule are treated fairly and consistently. . . ." Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L.Rev. 1557, 1563 (1975).

Sylvania submits that the equities of this case mandate the nonretroactive application of a broad *per se* rule based on the particular language of *Schwinn*. That *Schwinn* established a new principle of law of some dimension

[57]The principle was reiterated in *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969), although this Court reversed the Ninth Circuit on the grounds that the principle should not be applied to the very litigant who succeeded in changing the law.

[58]Other courts have echoed these views. In *Lyons v Westinghouse Electric Corp.*, 235 F.Supp. 526 (S.D.N.Y. 1964), for example, the court held that *Simpson v. Union Oil Co., supra*, which held for the first time that one could be guilty of retail price fixing in consignment arrangements, should not be applied retroactively to parties who were not litigants in the *Simpson* case itself. The court explained:

> "To hold Westinghouse liable now for damages for making and carrying out a contract which was perfectly legal at the time it was made and carried out, would be manifestly unjust." 235 F.Supp. at 537.

can scarcely be doubted.[59] Under the law in effect prior to *Schwinn*, and particularly that in effect in the relevant period involved in this lawsuit (1962-1965), Sylvania reasonably could have assumed nothing other than that its locations practice—pursued by a nondominant manufacturer with a very minor share of the market—was lawful under the rule of reason. The only reported case directly involving such a practice, *Boro Hall v. General Motors Corp., supra*, expressly so held. The courts, also, had uniformly upheld the legality of analogous "exclusive dealing" agreements in situations where neither the manufacturer nor dealer dominated the market.

Prior to the decision in *Schwinn* the legality of territorial or customer restraints depended upon an analysis of their competitive purposes and effects and a finding that they unreasonably restrained competition in the marketplace. *White Motor Co. v. United States, supra*. *White Motor* was uniformly accepted as decreeing a "rule of reason" test for all vertical restraints until the split opinion in *Schwinn*. See, *e.g., Sandura Co. v. FTC*, 339 F.2d 847 (6th Cir. 1964); *Snap-On Tools Corp. v. FTC*, 321 F.2d 825 (7th Cir. 1963). Even the Government didn't expect to prevail in *Schwinn* on a *per se* theory. See

[59]Continental concedes as much, acknowledging that in *White Motor* "the Court left open whether or not a *per se* rule ought to govern. Four years later, after wide ranging argument, and over pointed dissent, the issue was decided in *Schwinn*." Continental argues, not that *Schwinn* left prior law unchanged, but rather that pre-*Schwinn* doctrine was insufficiently "clear and established" to warrant non-retroactive application of the new doctrine announced therein (Pet. Br. 65-68). In so arguing Continental has not only misstated pre-*Schwinn* law, but has focused its argument on a peripheral consideration, as our discussion *infra* at 74-75 makes plain.

supra, at 32. Thus to say that *Schwinn* represented a significant departure from the approach of earlier cases is scarcely an overstatement, as attested to by the fact that Justice Stewart's separate opinion, joined by Justice Harlan, describes the decision in *Schwinn* as "a radical change in the law." 388 U.S. at 389. Justice Stewart further stated:

> "Despite the Government's concession that the rule of reason applies to all aspects of Schwinn's distribution system, the Court nevertheless reaches out to adopt a potent per se rule. *No previous antitrust decision of this Court justifies its action.* Instead, it completely repudiates the only case in point, White Motor." 388 U.S. at 388-389. [Footnote omitted and emphasis added.][60]

To apply such a radical change in the law retroactively to a locations practice, we submit, would be grossly unfair.

Furthermore, the purpose of the doctrine announced in *Schwinn*—"the preservation and promotion of competi-

[60]In the proceedings below and again before this Court, petitioners argue that *Schwinn* merely paralleled prior decisions and a pattern of antitrust consent decrees (Pet. Br. 64-68). Although that position ignores the clear language of *White Motor* as well as *Schwinn* itself, it accurately reflects the misimpression of law that the District Court brought to this case. For, as the Ninth Circuit recognized (Pet. Cert. App. A. 14, fn. 10), in instructing the jury Justice Clark apparently mirrored his own dissenting comments in *White Motor* rather than the rule of reason that decision properly stands for. We respectfully take exception to the District Court's remark, quoted at Pet. Br. 68, that, prior to *Schwinn,* "the general understanding in the antitrust bar" was such that even a law student would have known that Sylvania's locations practice was violative of the antitrust laws. It suffices to observe that distinguished members of the antitrust bar continue to perceive a legally decisive difference between territorial restrictions of the kind involved in *Schwinn* or *White Motor* and Sylvania's locations practice. See *supra,* at 36 fn. 29.

tion", 388 U.S. at 375—would not be furthered by retroactive application of that decision. All that would result is an inequitable penalty on the one hand and an unjustifiable windfall gain on the other. As the Seventh Circuit explained in *Bendix Corp. v. Balax, Inc.,* 471 F.2d 149, 157 (7th Cir. 1972), *cert. denied,* 414 U.S. 819 (1973), wherein the retroactivity of *Lear, Inc. v. Adkins,* 395 U.S. 653 (1969), was at issue:

> "To award damages occurring prior to the decision of *Lear,* based upon the license restrictions voided on that date, would not enforce *Lear's* policy but would be purely punitive, a result not warranted where, as here, no fraud nor bad faith was shown to be involved." 471 F.2d at 157.

The facts of this case, and the equities they generate, readily satisfy the three-pronged test this Court has articulated for determining whether a change of law should be applied retroactively in a nonconstitutional, noncriminal case. In *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-107 (1971), this Court said:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v United Shoe Machinery Corp., supra, at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v State Board of Elections, supra, at 572. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Linkletter v Walker, supra, at 629.

> Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' Cipriano v City of Houma, supra, at 706."[61]

Chevron Oil's emphasis upon basic notions of equity and fairness is particularly apt where, as here, there has been a precedent-breaking decision in the context of the punitive treble damage remedy.

Chevron Oil also laid to rest any implication from this Court's language in *Hanover Shoe, supra,* 392 U.S. at 496, that retroactivity decisions should turn upon whether a party demonstrates reliance in fact upon prior doctrine.[62]

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[61]Many lower courts have subsequently invoked and applied this test when called upon to decide whether a decision should be applied nonretroactively in a civil case. See, *e.g., Matter of S/S Helena,* 529 F.2d 744, 748 (5th Cir. 1976); *Jimenez v. Weinberger,* 523 F.2d 689, 702-704 (7th Cir. 1975), *cert. denied,* ..... U.S. ..... (1976); *American Timber & Trading Co. v. First Nat'l Bank of Oregon,* 511 F.2d 980, 984-985 (9th Cir. 1973), *cert. denied,* 421 U.S. 921 (1975); *Bourns, Inc. v. Allen-Bradley Co.,* 480 F.2d 123, 129-131 (7th Cir.) (Pell, J., concurring and dissenting), *cert. denied,* 414 U.S. 1094 (1973); *Bendix Corp. v. Balax, Inc., supra,* 471 F.2d at 155-158; *United States v. Benitez Rexach,* 411 F.Supp. 1288, 1293-1294 (D.P.R. 1975); *Hambrick v. Royal Sonesta Hotel,* 403 F.Supp. 943, 945-946 (E.D.La. 1975); *Bush v. Wood Brothers Transfer, Inc.,* 398 F.Supp. 1030, 1032-1033 (S.D.Tex. 1975); *Bergstrom v. Kissinger,* 387 F.Supp. 794, 795-796 (D.D.C. 1974), *aff'd,* 530 F.2d 1093 (D.C.Cir. 1976).

[62]In light of *Chevron Oil,* petitioners' contention that nonretroactive application of *Schwinn* is precluded because Sylvania has purportedly failed to show "reliance" on an "overruled" "clearly declared judicial doctrine" (Pet. Br. 64-65), is plainly miscast. Similarly inapposite is Continental's assertion that nonretroactive application of *Schwinn* would deprive it of "the fruits of successful litigation." (Pet. Br. 69.) The principle Continental invokes is limited to those litigants who succeeded in changing the law and who, on equitable grounds, are accorded the rewards which flow from their success. *Simpson v. Union Oil Co., supra,* 396 U.S. 13; *Lyons v. Westinghouse Electric Corp., supra.* It does not extend to a litigant who, like Continental, fortuitously filed its complaint before the change in law was announced in litigation pursued by others.

This and other courts have long recognized that participants in the commercial world must arrange their affairs "in reliance on the stability of decision," *Monroe v. Pape,* 365 U.S. 167, 222 (1961) (separate opinion of Frankfurter, J.), with "predictability of as great certitude as possible . . ." *Bourns, Inc. v. Allen-Bradley Co., supra,* 480 F.2d at 130 (Pell, J., concurring in part and dissenting in part). Reliance is thus reasonably presumed. As Chief Justice Burger wrote in *Lemon v. Kurtzman,* 411 U.S. 192, 199 (1973), "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct."

This is not to say that the nonretroactive application of *Schwinn* would completely immunize Sylvania's practice. All that Sylvania seeks is that the issue of whether it should be liable for treble damages for a practice carried out in 1965 and before be adjudicated under the rule of reason applicable at that time, rather than under a *per se* rule which first appeared in 1967. The effect of employing the nonretroactivity principle in the case at bar would simply be that the validity of Sylvania's conduct would depend upon whether that conduct unreasonably restrained competition.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals be affirmed and that the action be remanded with directions to hold a new trial under the rule of reason limited to petitioners' claim that they were injured in their business or property by reason of Sylvania's alleged enforcement of its locations practice.

Dated, San Francisco, California,
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OCTOBER TERM, 1976

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vs.

GTE SYLVANIA INCORPORATED,
Respondent.

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

I. SYLVANIA FAILS TO DISTINGUISH SCHWINN

A. By Rearguing the Evidence, But Ignoring The Findings and the Evidence which Support the Verdict, Sylvania Demonstrates that Schwinn Cannot be Distinguished on Its Facts

The issue is whether on this record a *Schwinn* instruction was warranted. Sylvania has never contended that, assuming the correctness of the instructions, the evidence does not support the verdict. Nor has Sylvania ever challenged the Trial Court Findings as clearly erroneous. Nonetheless, Sylvania in trying to distinguish this case from *Schwinn* reargues the facts, and in disregard of the traditional standards of appellate review ignores the

Findings, the Instructions, and the evidence supporting the verdict.[1] For example, Sylvania asserts that "[n]o retailer had the right to veto Sylvania's store assignments." (Syl. Br. p. 9) But the evidence on which the jury found a conspiracy showed (e.g., R.T. 431, 1538-39, A. 130, 319-20), and Justice Clark expressly found (Findings, No. 16, Pet. App. 126) that Handy Andy, Sylvania's Sacramento dealer, exercised precisely that prerogative. Compare *United States v. General Motors Corp.*, 384 U.S. 127 (1966). Further attempting to destigmatize its practice, Sylvania avows that its dealers could "sell to anyone wherever situated" and that "no purchaser from Sylvania was . . . confined to a particular territory . . . ." (Syl.

[1]Fed. Rules Civ. Proc., Rule 52(a) provides that "Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the Trial Judge to judge of the credibility of the witnesses". Findings are not "clearly erroneous" unless they are unsupported by substantial evidence contrary to the clear weight of the evidence, or induced by an erroneous view of the law. *John Blue Co. v. Dempster Mill Mfg. Co.*, 275 F.2d 668 (CA 8th, 1960); and see *United States v. United States Gypsum Co.*, 333 US 364, 394-395 (1948). Reviewing courts are, of course, bound to such standard and where the District Court merely chooses between two permissible views of the weight of the evidence a reviewing court is not entitled to substitute its contrary view. *United States v. Yellow Cab Co.*, 338 US 339 (1949); and see *Reconstruction Fin. Corp. v. Bankers Trust Co.*, 318 US 163 (1942).

Furthermore, a reviewing court may not usurp the Jury's function by weighing conflicting evidence, judging witness credibility and evaluating the verdict in that light. *Stancill v. McKenzie Tank Lines, Inc.*, 497 F2d 529 (CA 5th 1974). A verdict, supported by substantial evidence, may not be disregarded—Appellate non-review of conflicting evidence is the rule. *United States v. Socony-Vacuum Oil Co.*, 310 US 150 (1940); *Continental Air Lines, Inc. v. Wagner Morehouse, Inc.*, 401 F2d 23 (CA 7th 1968).

Sylvania, unable to attack either Justice Clark's Findings or the Jury's verdict, simply ignores both in its effort to show some benevolent purpose and effect respecting its post-sale dealer restriction.

Br. pp. 9, 34), and thus it imposed no restriction on resale territory or customers (Syl. Br. pp. 26, 34). These contentions flatly contradict the evidence (cited in extenso in our principal brief pp. 5-6) that dealers committed themselves not to resell except at Sylvania-approved locations, as well as the findings (Findings of Fact Nos. 7, 8, 13, Pet. App. 119, 120, 123) and Sylvania's own open court admissions (R.T. 3535, not printed in the joint appendix, R.T. 3575, A. 496) that because of the inherent nature of the television business, a dealer's maximum service area is limited to 25 to 50 miles from its store location, and that thus the jury issue was whether or not Sylvania utilized its "location practice" as a device to restrict Continental's resale *territories* (R.T. 3878, A. 479).

Yet again, Sylvania argues in this appellate proceeding that its resale restrictions "in every relevant market yielded effective competition with other Sylvania dealers . . ." (Syl. Br. p. 34), and that there was "guaranteed effective competition in the Sylvania product line in the Sacramento market." (Syl. Br. p. 11) But the evidence supporting the verdict and findings showed that one firm, Sylvania, managed the market and deployed dealers where it wanted them, and did so for the express purpose of eliminating resale competition. (Ex. F., R.T. 19, A. 25-28)[2] More than this, Sylvania's own records and

[2]Arguing the evidence to this Court, as though to the jury, Sylvania tries to dismiss its manual which instructed its salesmen on the elbow room restrictions by labelling the manual an "early intracompany" document and asserting that it was "never applied" in Northern California. (Syl. Br. p. 11, n. 7). The verdict and the trial judge's contrary findings, however, are supported by overwhelming evidence that the manual was followed to eliminate intrabrand competition in Northern California. (R.T. 475-77, 484-85, 492, 497-98, 536-41, 1122-27)

interrogatory answers showed that Sylvania persistently exercised its power to stifle the forces of resale competition in Sacramento in the years from 1962 to 1966. Before elbow room, there were many dealers there. After elbow room, Handy Andy had an effective monopoly in the sale of Sylvania products in Sacramento.[3]

Sylvania also argues repeatedly that it acted against Continental "as a consequence" of credit concerns (Syl. Br. p. 16) and that these concerns were "developing" before Continental shipped goods to Sacramento. (Syl. Br. pp. 15-17) The evidence (reviewed in detail in our principal brief, pp. 10-18) is overwhelmingly otherwise,[4] and

[3]By 1965 all Sacramento competition in Sylvania color sets was eliminated and competition in black and white sets was reduced to trivial proportions. By 1966 Handy Andy had the entire market. (Ex. FX, R.T. 1925-26)

The principal basis for Sylvania's contrary argument is testimony that in 1966 there was still a dealership in a town within a 50 mile radius of Sacramento, which handled a minimal amount of merchandise (R.T. 530-532, A. 166-168), and testimony that Sherman Clay had a store in Sacramento (A. 163-68, 268-271), which in 1965 handled about $10,000 of Sylvania goods; in fact, the Sylvania franchise for such a store was terminated in 1966 (R.T. 2912-13, A. 432). Manifestly, these trivialities do not undercut the convincing evidence that Sylvania and Handy Andy were deciding what outlets should operate in the Sacramento area, and that resale competition had been brought to a halt.

Sylvania also claims that expert testimony from Preston shows competition theoretically persisted in Sacramento. (Syl. Br. 11-13) Even if so interpreted, the trial judge and jury would not have been bound by Preston's opinion in the face of detailed evidence of what *actually* happened in that market. But, in fact, a reading of Preston's testimony shows that his theoretical analysis was predicated on numerous assumptions which were flatly contradicted by the evidence. (See the analysis of Preston in the dissenting opinion of Judge Browning, Pet. App. A. p. 104-106, especially footnote 15, p. 105-106 therein.)

[4]Perhaps the most telling single item is Exhibit BV, (A. 28), the wire reporting that Sylvania's regional credit official was withholding approval of Continental's last order pending information from the home office about the Sacramento situation. (See R.T. 1015-29, A. 258-66).

amply supports the verdict and the trial judge's finding that Sylvania's expression of concern about credit was a camouflage fabricated *after* Continental shipped goods to Sacramento.[5]

In addition to such direct contradictions of findings and evidence Sylvania uses innuendo and implication to distort the evidence which supports the verdict and the findings. Thus, for example, Sylvania euphemistically calls its restrictions "'franchis[ing]' with respect to locations," "a location practice," and a "selective" method of distribution (Syl. Br. pp. 2, 27, 46). In the same vein, it states that a "dealer authorized somewhere *as a Sylvania franchisee* was not authorized elsewhere" [different emphasis than original] and that its restrictions had to do with where dealers "might hold themselves out as Sylvania dealers" (Syl. Br. pp. 8, 30). These sanguine ways of putting the matter erroneously imply that Sylvania only restricted the locations at which Sylvania authorized

[5]A specific example of Sylvania's labored factual argument about credit is its assertion of a difference between its knowledge that Shahood, Continental's principal, had a Korean War era criminal record which it gained "at corporate headquarters in August 1965" and its knowledge of the same facts gained "in the field" at an earlier date, and its assertion that when it put its credit hold on Continental it was doing so "[a]s a consequence" of this new-found corporate headquarters knowledge. On this point, as on all the others it now reargues, Sylvania failed to persuade the trial judge or the jury. The evidence showed that the knowledge Sylvania belittles as knowledge "in the field" was that gained not by low-level personnel, but by the very people responsible for dealing with Continental, both as to sales and credit—namely, Sylvania's regional sales manager and regional credit manager—to whom Shahood had voluntarily disclosed his background many months before Sylvania increased Continental's line of credit. (Finding No. 15, Pet. App. B, 124-125). After that disclosure Sylvania's regional credit manager told Shahood that his exemplary business and family life during the intervening years far outweighed his youthful wrongs. (R.T. 1257-1262, not printed in Appendix.)

dealers could operate under its trade mark and could hold themselves out as its authorized representatives. Those assertions are clearly shattered by the evidence. For one thing, the franchise did not authorize a dealer to operate under Sylvania's name or mark at any location. (See Ex. 3; A. 18-22) But more importantly, evidence and the findings already cited show that Sylvania restricted the places to which dealers could ship goods and from which dealers could resell. Moreover, the jury was explicitly instructed that mere restricted distribution and "franchising by location" are perfectly lawful so long as resale restrictions limiting the places at which, or persons to whom resale may be made are not used. (R.T. 3435-3448, A. 480-493.)[6]

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[6]In Part A of its brief, p. 31-44, where Sylvania seeks to distinguish *Schwinn*, it repeatedly confuses the distinction between a location restriction on the places where a franchise is authorized to do business under the franchisor's mark or hold itself out as the franchisor's representative, and the restrictions it actually imposed on the locations at which a buyer can resell. For example, Sylvania's footnote 24, p. 32 asserts without basis that the remand orders in *Schwinn* and *Topco* authorized restrictions as to the locations from which resales could be made. Similarly, Sylvania's footnote 28, p. 36 claims that *Kaiser, Salco* and *Boro Hall* support Sylvania's position and makes the gratuitous assertion that "franchising by location . . . means nothing if it does not entail express or implied limitations upon the authority of the retailer to transship . . . to unauthorized locations." In fact, none of these cases, nor any other case so far as we can discover, even remotely suggests that a mere "location franchise" contains an implied restriction forbidding dealers to ship goods to other locations for resale. Indeed, in *United States v. General Motors Corp.*, 384 U.S. 127 (1966) this Court, by holding the latter type of restriction unlawful, yet declining to pass on the legality of the former, demonstrated its view that a location franchise and a location resale restriction are quite distinguishable. Inherent in the franchising of a trade mark or name is the right to restrict the location for which that permission is given; clearly, however, this is not the situation presented herein.

In its factual argument Sylvania (taking out of context a part of the instructions as did the majority below) asserts that under the instructions given a verdict for Continental was "virtually assured." (Syl. Br. p. 21) But a verdict for Continental was not at all assured unless the jury, as trier of the facts, believed Continental's evidence. At trial, Sylvania claimed that it acted unilaterally; that it merely franchised by locations, without restricting resales; and that it took action against Continental out of credit concerns. On the instructions given, if the jury believed Sylvania on even one of these factual defenses, a verdict for Sylvania, rather than Continental would have been "virtually assured." The truth that Sylvania ignores is that it lost on each such factual defense.

In sum, by trying to relitigate the facts Sylvania demonstrates that one cannot distinguish this case from *Schwinn* without a labored effort to ignore the instructions, to ignore the evidence which supports the verdict, and to ignore the trial court's detailed findings. The Court of Appeals should be reversed on the ground that the evidence warranted the verdict that Sylvania conspired to stamp out resale competition by utilizing post-sale location restraints as a device to restrict territories among its dealers.

B. The Analytical Distinctions Sylvania Attempts Between This Case and Schwinn are Equally Unavailing

Sylvania would distinguish this case from *Schwinn* on the ground that the territorial resale restraint in *Schwinn* was imposed by contract, whereas the territorial resale restraint here was "not by contractual compulsion but by

economic limitation inherent in the market." (Syl. Br., p. 38) But a contract always interacts with commercial realities. The reason Schwinn's arrangement segregated dealers is that, given the nature of the bicycle business, the restraint imposed was sufficient to achieve that effect. Precisely the same is true here. Given the nature of TV retailing, the form of restraint used by Sylvania is sufficient to achieve Sylvania's stated purpose of stamping out same brand competition and eliminating "vicious price cutting". (Exs. C and F, A. 23-25, A. 25-28) It is the purpose and effect of the restraint, not its form, which is crucial. *United States v. Masonite Corp.*, 316 U.S. 265, 278 (1942); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *Standard Fashion Co. v. Magrane-Houston Co.*, 285 U.S. 346 (1922), *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 456-57 (1922).

Sylvania also argues that its resale restraint is more like an exclusive dealership (Syl. Br. p. 39) than like *Schwinn's* form of resale constraint. The contrary is plainly so. As Sylvania concedes, any arrangement by a manufacturer for "dealer spacing" is designed to confer market power on the dealer, thus giving the dealer additional incentive to make sales of the manufacturer's particular brand. (Syl. Br. p. 45) Market power means, of course, power to increase prices. In the case of an exclusive dealership, that power cannot be excessive; if the dealer uses such power to raise prices excessively dealers from other territories will transship merchandise to that dealer's territory. But where the manufacturer's spacing plan entails a resale restraint on dealers, such as that used by *Schwinn* and by Sylvania, the amount of market power conferred by the arrangement moves to

a higher order of magnitude. Now, when the protected dealer raises his price, no other dealer can challenge him.[7]

Despite the fact that Sylvania did not grant exclusive dealerships Sylvania also argues (Syl. Br. pp. 40-43) that resale restraints like the ones it uses might aid in implementing exclusive dealerships, and therefore that its resale restraints should be distinguished from those in *Schwinn*.[8] If that argument justifies restraints in the Sylvania form it would also justify those in the Schwinn form; there is no relevant difference. Beyond this, the decision of this Court in *Albrecht v. Herald Co.*, 390 U.S. 145, rehearing denied, 390 U.S. 1018 (1968) cuts the ground

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[7]Sylvania while, on the one hand, arguing that its restraint is like an exclusive dealership, and arguing also that its form of restraint is needed to make exclusive dealerships work (Syl. Br. 40-43), makes on the other hand the inconsistent claim that its restraint does not unduly dampen resale competition because, in fact, Sylvania does not link its resale restraint to an exclusive dealership. It is true enough that the negative impacts of a resale restraint which, like that here and in *Schwinn*, would be compounded if combined with an exclusive dealership. But that, as *Schwinn* holds, does not mitigate the fact that the resale restriction alone dampens competition excessively. What happened in Sacramento clearly exemplifies the severe anticompetitive impacts. Moreover, if the distinction Sylvania is trying to draw were valid, Schwinn's resale restrictions would have been lawful, too. Schwinn granted no exclusive dealerships to its franchisees. It remained free to add dealers if it decided to do so. The vice in the Schwinn scheme, like the vice here, is that it removes that decision from the market place, where dealers would be making it, to the manufacturer's board room. Indeed, if Sylvania's distinction were valid, *Dr. Miles* price fixing scheme would also be beyond reproach since Dr. Miles could at any time lower dealer resale prices.

[8]A forthcoming article may be of aid to the Court in comparing resale restraints like *Schwinn's* and Sylvania's with less restrictive arrangements like exclusive dealerships. See Martin B. Louis, *Vertical Distributional Restraints Under Schwinn and GTE Sylvania: The Partial Per Se Approach of the Former is the Proper One*, Mich. L. Rev. (forthcoming).

from under the contention. In *Albrecht,* a newspaper granted exclusive dealerships and, in order to be sure that dealers did not use resulting market power in detrimental ways, imposed an "ancillary" restraint fixing the *highest* price at which dealers could resell. Reasoning much as does Sylvania, the Court of Appeals asserted that the exclusive dealership rights were valid and that the price ceiling was necessary to implement this lawful arrangement. Citing *Schwinn,* this Court rejected that assertion. (390 U.S. at 153-154). In *Albrecht,* the otherwise unlawful ancillary restraint failed to gain validity on the ground that its purpose and effect was to *reduce* the market power dealers gained from exclusive dealerships. *A fortiori,* the Court should reject Sylvania's contention that if it had granted exclusive dealerships its unlawful resale restraints would gain validity on the ground their purpose and effect might be to *increase* the market power dealers gain from such exclusive dealerships.[9]

Sylvania's claim that its form of restraint is more like a primary responsibility clause than the *Schwinn* form of restraint (Syl. Br. p. 37) is also erroneous. A primary responsibility clause does not keep any dealer from enter-

[9]Relying on dicta from *Schwinn* (388 U.S. at 376), Continental has conceded that exclusive distributorships are presumptively lawful, absent resale restraints on the dealer. (Cont. Br., p. 44) This reading of the *Schwinn* dicta is not the only possible one. The *Schwinn* opinion's citation of *United States v. Colgate & Co.,* 250 U.S. 300 (1919) may imply no more than that a manufacturer may " 'franchise' certain dealers to whom, alone, he will sell" only where the manufacturer acts *unilaterally.* This possibility as to the meaning of *Schwinn* is what Professor Turner seems to allude to in the quotation set forth in footnote 34, page 42 of Sylvania's brief. In any event, the citation of *Schwinn* in Justice White's *Albrecht* opinion clearly implies that the granting of an exclusive franchise does not validate an otherwise unlawful resale restraint.

ing any market it wishes to enter or from offering competition to any dealer anywhere.[10] Sylvania's restraint does keep dealers from offering competition in other markets, just as it kept Continental out of Sacramento.

II. SCHWINN IS SOUND LAW REFLECTING SOUND POLICY AND NOTHING IN THE ARGUMENT OF SYLVANIA OR THE AMICAE SUGGEST GROUNDS TO RECONSIDER IT

Sylvania argues that this Court should validate Sylvania's restrictive distribution system by overruling *Schwinn.* Amicae echo this theme. These arguments imply that *Schwinn* was a novel innovation and that it has been much distinguished. Few characterizations could be less accurate. The analytical and the policy roots of *Schwinn* are deeply embedded in the jurisprudence of this Court, and *Schwinn* itself has not only been regularly followed, but extended.

A. Schwinn Accurately Applied Prior Law

Sylvania, citing Robinson, suggests with some disdain that *Schwinn* is based on the " 'ancient rule against restraints on alienation'," implying that the case was a novel and ill-starred adventure into antiquarianism (Syl.

[10]If a primary responsibility clause is deliberately administered with the purpose and effect of keeping a dealer from reselling in markets assigned as the primary responsibility of other dealers, this arrangement, too, falls under the rule against resale restrictions. E.g., *Reed Brothers, Inc. v. Monsanto Co.,* 525 F.2d 486, cert. denied, 46 L.Ed.2d 645, 96 S.Ct. 787 (1975); *Hobart Brothers Company v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894 (5th Cir. 1973).

Br. 52).[11] In fact, it was not *Schwinn,* but Justice Hughes' opinion in *Dr. Miles* which brought that very relevant common law concept into the service of antitrust:

> "But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction. Thus a general restraint upon alienation is ordinarily invalid. 'The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. "If a man," says Lord Coke, in Coke on Littleton, section 360, "be possessed of a horse or any other chattel, real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man."' *Park v. Hartman* [153 Fed. Rep. 24]. See also Gray on Restraints on Alienation, §§ 27, 28." (220 U.S. at 404-05)

It is notable that this Court rejected the claim by Dr. Miles, now echoed by Sylvania, that a manufacturer has an inherent interest in controlling resales (220 U.S. at

[11] Two of Sylvania's secondary authorities, Robinson and Pollock, are advocates whose arguments must of course be considered but for whom we do not suppose Sylvania claims any scholarly objectivity.

407), and that Dr. Miles, like Sylvania, asserted (220 U.S. 375) and this Court denied (220 U.S. 407) that manfacturers had a reasonable need to reduce resale competition and enlarge dealer profits in order to induce dealers to favor sale of its product. In *Dr. Miles* this Court also stressed that the public interest is the primary concern (220 U.S. at 406), and that any advantage to manufacturers in the maintennace of fixed retail prices could not lawfully be attained

> "by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the [manufacturer] can fare no better . . . than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other." (220 U.S. at 407-08)

That the rationale of *Dr. Miles* comprehended the Sherman Act goals of dealer independence and consumer welfare is also clear. As Justice Hughes there stated:

> "But because a manufacturer is not bound to make or sell, it does not follow in case of sales actually made he may impose upon purchasers every sort of restriction. Thus, a general restraint upon alienation is ordinarily invalid." 220 U.S. at 404.
>
> "[The manufacturer] having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." 220 U.S. at 409.

In *United States v. A. Schrader's Son, Inc.,* 252 U.S. 85 (1920), this Court resounded these same themes, making clear that *United States v. Colgate & Co.,* 250 U.S. 300 (1919) in no sense diminished them. Justice McReyn-

olds' opinion stresses that the manufacturer may not enter into agreements with dealers which "take away dealers control of their own affairs." (252 U.S. at 100) See also *Frey & Sons, Inc. v. Cudahy Packing Co.*, 256 U.S. 208 (1921).

The decision in *Schwinn* was nothing more nor less than the application of the *Dr. Miles* rationale to another situation which in principle it governs. Every vice the *Dr. Miles* opinion found in resale price restrictions appears as clearly in restrictions on where and to whom a buyer may resell. Both types of restriction have the purpose and effect of giving market power to dealers by dampening resale competition. Both tend toward higher prices. Both diminish dealer independence. Both remove resale decisions from the market place and assign them to the administered judgment of the manufacturer where a competitive system would mandate that they be made by the traders who make the investment.

Similarly, every justification that can be offered for a *Schwinn* or Sylvania resale restraint can as plausibly and convincingly be offered for a *Dr. Miles* restraint. With identical force and effect, either restraint could be used to "attract aggressive dealers, improve [the manufacturer's] product image and expand its market share" (Syl. Br. p. 10); both reflect the manufacturer's choice of the way to "maximize its interbrand competitive potential" (Syl. Br. p. 30). Again, resale price restraints are not saved by the fact that, since the manufacturer controls the matter, it can direct that prices be reduced if it concludes that it has conferred too much market power; so neither should restrictions on where goods can be resold be saved merely because the manufacturer has

the power to add additional dealers if it concludes that too much power has been conferred. (Syl. Br. p. 46)

It is no occasion for surprise that commentators insist on the fundamental identity of resale price and resale customer and territorial restraints, whether or not they view such restraints as seriously harmful.[12] As one commentator put in it insisting that the same rule should apply to resale restraints on price and territory:

> "[I]t can make little policy sense to say that businesses cannot agree to one restraint but that they can agree to another which is functionally the same. The rules established for comparable restraints ought to yield consistent results. If there is not at least this level of consistency, then the rules are absurd and can serve no policy function except charade."[13] (Carstensen,

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[12]Compare Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 283, 287-88 (1975); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 Yale L.J. 373, 403 (1966); and Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 Harv. L. Rev. 1720, 1731-32, 1737 (1974), with Comanor, *Vertical Territorial and Customer Restrictions: White Motor and its Aftermath*, 81 Harv. L. Rev. 1419 (1968).

[13]It hardly need be stressed that Sylvania's repeated practice of equating (1) manufacturer power to grant market power to dealers to induce them to push its brand and (2) benefits to interbrand competition is totally fanciful. Interbrand competition between manufacturers prospers when there are a large number of manufacturers competing with each other on price and quality and profits fall to the level of a reasonable return. To assert that competition is aided by allowing manufacturers to vie with each other through their success in attracting dealers by conferring market power on them in the resale market, certainly distorts common conceptions about what competition is about.

It is also clear that Sylvania's scale efficiency justification for resale restrictions (Syl. Br., p. 40) has little to do with reality. Efficient scale, like any other kind of efficiency, is maximized through the process of incremental decisions made and tested in the market place, not by a monolithic decision maker planning on a macro scale how resources should be allocated.

Vertical Restraints and the Schwinn Doctrine: Rules For Creation and Dissipation of Economic Power, 26 Case Western Reserve Law Review 771, 825 (1976))

Sylvania also attacks *Schwinn* by asserting that the distinction that case drew between sales and consignments is inconsistent. (Syl. Br. 53-54) But that distinction is intimately related to the policies which *Schwinn* carries forward. Where the integrated manufacturer makes the investment and takes the risk at the resale level the market is directly engaged to test the judgments the manufacturer makes about where, to whom and at what prices to sell. In a competitive economy it is appropriate for such a manufacturer to make the decisions, for precisely the same reasons that the dealer should make them when the dealer bears the risk. Also, it is no threat to dealer independence for the integrated manufacturer to make such decisions.[14]

Furthermore, the distinction between consignment and sales which Sylvania attacks is not original to *Schwinn.*

[14]To reject the importance of dealer independence as a Sherman Act goal would be to reject not only *Dr. Miles* and *A. Schrader's Sons, supra,* but it would also be to reject cases like *Simpson v. Union Oil* and *Albrecht v. The Herald Co., supra,* which emphasize this policy concern in other contexts. Important as the economic considerations served by a competitive market are, these have never been taken by the Court as the sole goal of the Sherman Act. When one views the act in a historical context, it becomes clear that the act expresses an abiding American conservatism which seeks out ways to divide, limit and diffuse both governmental and private power. See Hofstadter, "What Happened to the Antitrust Movement?" in *The Paranoid Style in American Politics and Other Essays,* 233 (1965). See also Judge Browning's dissent, Pet. App. A. 87, et seq., and *United States v. Aluminum Co. of America,* 148 F2d 416, 428-29 (2d Cir. 1945).

It, too, derives directly and explicitly from *Dr. Miles* (220 U.S. at 395-397), and has been repeatedly applied both in resale price cases *United States v. General Electric Co.,* 272 U.S. 476 (1926); *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964), and resale market division cases. *FTC v. Curtis Publishing Co.,* 260 U.S. 568 (1923); and *Schwinn.*

B. Schwinn Has Been Consistently Applied and Extended

Sylvania's suggestion that *Schwinn* is much distiguished is also at odds with reality. *Schwinn* was the Bedrock authority for *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972) where this Court held that benefits to interbrand competition cannot justify injury to intrabrand competition. In *Albrecht v. Herald Co.,* 390 U.S. 145, rehearing denied, 390 U.S. 1018 (1968) this Court cited *Schwinn* in support of its holding that the court below could not properly assume that vertical price restrictions imposed by a newspaper were valid. See also *Otter Tail Power Co. v. United States,* 410 U.S. 366, rehearing denied, 411 U.S. 910 (1973), and *United States v. Glaxo Group, Ltd.,* 409 U.S. 818 (1973), in which this Court assumed the authority of *Schwinn.* Moreover, lower court cases applying Schwinn are legion.[15]

[15]E.g., *Noble v. McClatchy Newspapers,* 533 F.2d 1081 (9th Cir. 1975), modif. denied, 537 F.2d 1030 (9th Cir. 1976), cert. petition pending U.S. S.Ct. Dkt. No. 76-242; *Reed Bros., Inc. v. Monsanto Co.,* 525 F.2d 486 (8th Cir. 1975), cert. denied, 46 L.Ed.2d 645, 96 S.Ct. 787 (U.S. S.Ct. 1976); *Pitchford v. Pepi Inc.,* 531 F.2d 92 (3d Cir. 1976), cert. denied, 49 L.Ed.2d 387, 96 S.Ct. 2649 (U.S. S.Ct. 1976); *Eastex Aviation, Inc. v. Sperry & Hutchinson Co.,* 522 F.2d (5th Cir. 1975); *Cooper Liquor, Inc. v. Adolph Coors Co.,* 506 F.2d 945 (5th Cir. 1975), rehearing denied, 509 F.2d 758 (5th Cir. 1975); *Adolph Coors Co. v. FTC,* 497 F.2d 1178 (10th Cir. 1974), cert. denied, 419 U.S. 1105

Finally, Sylvania contends (Syl. Br. pp. 54-48) that there is an inconsistency between the legal power of a manufacturer to refuse to franchise a new or "stranger" dealer in the first instance, even though that decision be based on the ground that the manufacturer does not want any additional dealer selling in the territory where the stranger sells, and the legal disability *Schwinn* imposes on a manufacturer by precluding the manufacturer, once it has franchised a dealer, from exacting from that dealer a commitment not in the future to sell in particular markets where the manufacturer does not want additional dealers. Actually, a manufacturer's powers and disabilities vis à vis the "stranger" are essentially the same as its powers and disabilities with reference to its current dealers. So long as concert with others is scrupulously avoided, the manufacturer who unilaterally refuses to take on a new dealer is a classic example of a manufacturer exercising

(1975); *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F. 2d 894 (5th Cir. 1973), cert. denied, 412 U.S. 923 (1973); *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621 (2d Cir. 1969); *Hensley Equipment Co. v. Esco Corp.*, 383 F.2d 252 (5th Cir. 1967), amended on other grounds, 386 F.2d 442 (5th Cir. 1967); *Adolph Coors Co. v. A. & S. Wholesalers, Inc.* 1975 CCH Trade Cases ¶ 60,187 (D. Colo. 1975); *United States v. Revlon, Inc.*, 1975 CCH Trade Cases ¶ 60,202 (S.D.N.Y. 1975); *Fairfield County Beverage Distributors, Inc. v. Narragansett Brewing Co.*, 378 F.Supp. 376 (D. Conn. 1974); *Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc.*, 375 F. Supp. 610 (E. D. Pa. 1974), mod. on other grounds, 383 F.Supp. 586 (E. D. Pa. 1974); *Cook v. Ralston Purina Co.*, 366 F.Supp. 999 (M. D. Ga. 1973); *Bowen v. New York News, Inc.*, 366 F.Supp. 651 (S.D.N.Y. 1973), aff'd in part and reversed in part, 522 F.2d 1242 (2d Cir. 1975), cert denied, 48 L.Ed.2d 177, 96 S.Ct. 1667 (1976); *Dobbins v. Kawasaki Motors Corp.*, 362 F.Supp. 54 (D. Ore. 1973); *Ammerman v. Bestline Products, Inc.*, 352 F.Supp. 1077 (E. D. Wis. 1973); *Lepore v. New York News, Inc.*, 346 F. Supp. 755 (S.D.N.Y. 1972); *United States v. Glaxo Group Ltd.*, 302 F.Supp. 1 (D. D. C. 1969), reversed on other grounds, 410 U.S. 52 (1973); *Sherman v. Weber Dental Mfg. Co.*, 285 F.Supp. 114 (E. D. Pa. 1968).

rights under *United States v. Colgate & Co.*, 250 U.S. 300 (1919). That *Colgate* defense would also be available to a manufacturer which divides resale markets by announcement and refusal to deal, so long as it, too, scrupulously avoided concerted action. Indeed, Sylvania requested and obtained a *Colgate* instruction to the jury in this very case. (A. 490, 492-493) But just as the manufacturer cannot through contract, combination or conspiracy, confine the price at which, places in which and persons to whom an existing dealer will sell, the manufacturer could not by conspiracy keep the "stranger" dealer from entering a territory where the manufacturer did not want him. For example, both *Schwinn* and *United States v. General Motors Corp.*, 384 U.S. 127 (1966) would make it unlawful to exact from existing dealers a commitment not to resell to a "stranger" serving a territory where the manufacturer wanted no additional dealers.

III. THE FAILING COMPANY CLAIM APPROACHES THE FRIVOLOUS

Sylvania cites opinions of its executives that Sylvania might have gone out of business in 1962 if it had not changed its distribution system. (Syl. Br. pp. 5-6) This evidence does not make out a jury case under the failing company doctrine. There is absolutely no evidence that Sylvania, either generally or in its TV business, was not earning a reasonable return, or that its 2% market share deprived it of needed scale efficiencies.[16] Evidence that

[16]There was no evidence that Sylvania could not recruit dealers; indeed, in contrast to *Sandura v. FTC*, 339 F2d 847 (6th Cir. 1964), Sylvania was trying to get rid of dealers, not to attract them.

Sylvania might have withdrawn from the competitive game unless it could break the rules is not evidence warranting suspension of the Sherman Act. Clearly, Sylvania at no time considered or implemented less restrictive lawful alternatives which were available to it. (See Pet. Br. pp. 48-49, 53.) If subjective dissatisfaction with market share makes out a failing company defense, then any firm which insists on an antitrust exemption as its price for staying in a market would be entitled to have one.

There is no evidence that Sylvania's 2% market share was not profitable; or that other TV manufacturers, with comparable or smaller shares, had to adopt similar post-sale restrictions to stay in business.

There is certainly not a shred of evidence that in 1964 and 1965, after it had gained a larger market share, Sylvania had to restrict resale competition and make predatory attacks against violators in order to stay in the TV business. On this record to have submitted the case to the jury on a failing company instruction would have been to allow the jury to license antitrust violations for any firm which was disappointed with the results of the competitive game.[17]

[17]Sylvania's offered instruction was not a correct statement of the "Failing Company" doctrine and was correctly refused for this reason alone. (See Pet. Br. p. 64) Contrary to Sylvania's view (Syl. Br. p. 68, Fn. 56), the Trial Court was not required to re-write such proffered instruction in order to correctly state such doctrine. It is not error to refuse a requested instruction which is not an entirely correct statement of the law or which is likely to mislead or be misunderstood by the Jury. *Cherry v. Stedman*, 259 F2d 774 (CA 8th 1958); *Mann v. Anderson*, 447 F2d 533 (7th Cir. 1971).

Sylvania has shown no justification as to why, after five years of trial preparation, it should be entitled to further trial in an effort to produce "Failing Company" evidence sufficient to create a jury issue. Compare *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.* ..... U.S. ..... (U.S. Sup. Ct. No. 75-904, decided Jan. 25, 1977.)

IV. NO SERIOUS RETROACTIVITY ISSUE IS PRESENTED

Sylvania never explains why it had during 1962-1965 "every reason to believe" its resale restraints were valid (Syl. Br. p. 69) when the Department of Justice had announced as early as 1955 its position that such restraints were per se unlawful, (see Hearings on Automobile Marketing Legislation Before a Subcommittee of the House Comm. on Interstate and Foreign Commerce, 84th Cong. 1st Session 89, 362 (1955)), and had been successfully challenging substantially identical practices in the courts during the intervening years. If Sylvania's claim is that its variation in the form of its restraint assured it of safety, it could hardly have been very reliant, particularly in light of *United States v. Masonite Corp.*, 316 U.S. 265 (1942) and *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

Furthermore, the facts of this case, persistently ignored by Sylvania, destroy such claim. Sylvania acted not unilaterally but at the insistence of its co-conspirator Handy Andy, and then with devastating predatory conduct that all but destroyed Continental. In light of such conspiracy and the outrageousness of its conduct, Sylvania could have hardly believed itself shielded by some doc-

trine of per se legality. The most Sylvania could conceivably have hoped was for a rule of reason instruction when its practice was challenged. Sylvania can point to no prior rule like that involved in *Simpson,* giving assurance in any degree that its conduct was legal.

Sylvania seeks here to gain a retroactivity defense not just for its overall scheme of resale restraints, but for a blatantly predatory attack on Continental. Sylvania had to have known that its post-sale restraint predatorily enforced at the request of a protected dealer was fraught with illegality, at best. Certainly, Sylvania could not have equitably relied on any prior doctrine of lawfulness under these circumstances. (Compare *Cantor v. The Detroit Edison Co.,* 96 S.Ct. 3110, 49 L.Ed.2d 1141 (U.S. S.Ct. 1976).

V. CONCLUSION

This case involves Sylvania's *use* of dealer resale restrictions to *achieve* closed territories. It thus requires merely a pedestrian application of the *Schwinn* doctrine to facts conclusively found by the Trial Judge and Jury.

The Judgment of the Court of Appeals should be reversed and the case remanded with direction that the District Court Judgment and Decree be reinstated in all respects.

Dated, February 3, 1977,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC, INC. and S.A.M. INDUSTRIES, INC., *Petitioners,*

v.

GTE SYLVANIA, INC., *Respondent.*

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit

MOTION OF INTERNATIONAL FRANCHISE ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION OF INTERNATIONAL FRANCHISE ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The International Franchise Association ("IFA") hereby respectfully moves, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief *amicus curiae* in support of respondent in this case. The consent of the attorney for the respondent

has been obtained. The consent of the attorney for the petitioners was requested but refused.

The interest of IFA in this case arises from its role as a trade association for the franchise industry and the broad impact which this Court's decision may have upon that industry.

IFA was established in 1960 by a small number of franchisors in response to the burgeoning growth of franchising as a method of distribution for an expanding range of goods and services. In 1976 there were an estimated 457,693 establishments engaged in a myriad of franchised businesses, accounting for sales of goods and services exceeding $190 billion, including 28 percent of all retail sales in the United States, and employing more than 3.4 million people.[1]

IFA's current membership includes approximately 230 franchise companies representing more than 30 different industries, including automobile, truck and equipment rentals, automotive products and services, beverages, bicycles, books, clothing, convenience grocery stores, drugs, electronic products, employment agencies, hardware, home furnishings, hotels and motels, paint and decorating supplies, printing and copying, restaurants, soft drink bottling, tax return preparation, and a broad range of other personal service and retail sales businesses. The purposes and goals of IFA include providing business and legal education to franchisors and prospective franchisors through management seminars, legal symposia, newsletters and legal bulletins, and participating as a spokesman for

[1] U.S. Department of Commerce, *Franchising in the Economy* 1974-76, pp. 1, 5.

franchisors in legislative, judicial, and administrative matters relating to franchising.

In this private antitrust case, the Court of Appeals for the Ninth Circuit held that a limitation imposed by a manufacturer-franchisor upon the location from which a dealer-franchisee was authorized to offer the franchisor's product for resale should be judged under the rule of reason. *GTE Sylvania, Inc.* v. *Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976). Petitioners maintain that the restriction should be held unlawful *per se* under *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

IFA's interest in the issues presented is plain. As the court of appeals recognized, adoption of a *per se* rule "would have grievous implications for the common and established practices of franchising and the granting of exclusive dealerships" (537 F.2d at 998). The essence of most, if not all, franchising operations is the licensing of persons at different locations, and the franchisor frequently desires to enhance the effectiveness of his system by utilizing such common techniques as exclusive dealerships, which serve "as the stimulus for active product marketing by dealers" (*id.* at 1014, dissenting opinion). Reversal of the decision of the court of appeals could seriously jeopardize the manner of operation employed by numerous franchisors in various fields.

It is precisely in the area of franchising that *Schwinn* and its ramifications have their greatest impact, and IFA believes that the franchise industry perspective and experience will be helpful in assessing that impact. As *amicus curiae,* IFA will urge affirmance of the de-

cision below and a reconsideration of the *per se* rule of *Schwinn*.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF INTERNATIOAL FRANCHISE ASSOCIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, [illegible]PAC, INC. and S.A.M. INDUSTRIES, INC., *Petitioners,*

v.

GTE SYLVANIA, INC., *Respondent.*

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF INTERNATIONAL FRANCHISE ASSOCIATION

INTEREST OF AMICUS CURIAE INTERNATIONAL FRANCHISE ASSOCIATION

The interest of *amicus curiae* International Franchise Association ("IFA") is set forth in IFA's motion for leave to file this brief, *supra.*

STATEMENT AND SUMMARY OF ARGUMENT

The central question before the court of appeals in this private antitrust action was "whether the district judge erred in concluding, and instructing the jury accordingly, that under the supposed rationale of *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), Sylvania's practice of fixing by agreement the locations from which Continental was authorized to sell Sylvania's products was illegal *per se* under Section 1 of the Sherman Act" (537 F.2d at 982).

Schwinn dealt with customer and territorial resale restrictions imposed by a manufacturer on its distributors and franchised retailers, rather than with the location clauses involved here. A minority of the court of appeals sitting *en banc* conceded that "*Schwinn* did not expressly outlaw location clauses by name" (537 F.2d at 1010) but was nevertheless "convinced that Sylvania-type location clauses and *Schwinn*-type territorial restrictions are identical in effect and are both *per se* illegal under the command of *Schwinn*" (*id.*). The majority held that this conclusion "reflects a misinterpretation of *Schwinn*, is inconsistent with the existing law permitting exclusive dealerships, and, most importantly, would seriously undermine, rather than implement, the major purpose of the Sherman Act" (*id.* at 988). Declining to extend "the rule of *per se* illegality established . . . [in *Schwinn*] to embrace the 'locations practice' utilized by Sylvania and others as a method of modern product distribution systems," the court of appeals held that "[t]he 'rule of reason' should have been applied, permitting inquiry into the competitive effect and reasonableness of the locations agreement in question" (*id.*).

The decision of the court of appeals was correct and should be affirmed. The court's thorough opinion fully supports the result reached and will be treated in detail by respondent; hence, in Point I, IFA discusses only the salient features of the decision.

Respondent has also urged this Court to reconsider the *per se* rule of *Schwinn* itself (Br. in Opp. at 18 n. 12). IFA's brief is principally addressed to that issue. IFA believes reconsideration is appropriate in light of the questionable soundness of the *Schwinn per se* rule and the almost unprecedented confusion and uncertainty it has generated for the courts and the business community alike—the very confusion *per se* rules ostensibly seek to avert. Further, IFA submits that compelling reasons of antitrust policy require that vertical territorial and customer restraints be appraised under a standard of reasonableness, which invites, rather than forecloses, an examination of their "actual impact . . . on competition." *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DECLINED TO EXTEND THE PER SE RULE OF SCHWINN TO EMBRACE SYLVANIA'S LOCATION CLAUSE.

The court of appeals offered three principal reasons for refusing to extend the *Schwinn per se* rule to cover Sylvania's location clause. First, the court determined that location clauses, whose validity under the Sherman Act had repeatedly been sustained both before and after *Schwinn*—notably, in the decree on remand in *Schwinn* itself—differ significantly in competitive effect from the total elimination of intrabrand competition produced by the territorial restraints held *per*

se unlawful in *Schwinn* (537 F.2d at 988-97). Second, the court noted that to hold location clauses invalid *per se,* and thus to allow franchised dealers to establish additional outlets wherever they wished, would effectively destroy the common practice of granting exclusive dealerships, whose legality in non-monopoly settings has been affirmed by "a veritable avalanche of precedent" (*id.* at 997), and "would have grievous implications for . . . franchising" (*id.* at 998). The court's final, "and perhaps . . . most compelling," reason (*id.* at 1000) was its belief "that location agreements like the ones adopted by Sylvania may in some instances *promote*, rather than impede, competition" (*id.*, emphasis in original). Thus, judging these agreements under the rule of reason, rather than a rule of *per se* illegality, is appropriate.

The efforts of petitioners and the minority in the court of appeals to avert the force of these arguments do not withstand scrutiny.

1. Conceding that "*Schwinn* did not expressly outlaw location clauses by name" (*id.* at 1010) and that "the Sylvania territorial line may not be as clearly defined as that in *Schwinn*" (*id.* at 1009), the minority nevertheless asserts that the Sylvania and *Schwinn* practices are "identical in effect" (*id.* at 1010). The reasons why the two practices are not "identical" are elaborated in the majority opinion (*id.* at 988-97) and need not be reiterated.

2. The minority's attempt to escape the force of the judicial precedents sustaining the validity of location clauses both before and after *Schwinn* is entirely unpersuasive. For example, the leading case of *Boro Hall Corp.* v. *General Motors Corp.*, 124 F.2d 822 (2d Cir. 1942), is dismissed by the minority as "not in point" (537 F.2d at 1016), even though, on the minority's own description of that case, any differences between the practices of General Motors in that case and Sylvania are imperceptible. *Salco Corp.* v. *General Motors Corp., Buick Motor Div.*, 517 F.2d 567 (10th Cir. 1975), holding "the location clause . . . valid as a matter of law" (*id.* at 576), is viewed as unauthoritative (537 F.2d at 1016); and *Kaiser* v. *General Motors Corp.*, 396 F. Supp. 33 (E.D. Pa. 1975), *aff'd*, 530 F.2d 964 (3d Cir. 1976), affirming a summary judgment which found that *Schwinn* did not render location clauses unlawful, is not discussed by the minority at all.

Even more disturbing is the minority's effort to define location clauses out of existence. To the minority, the right to franchise by location would mean only the right to "specify the location at which a retailer is the manufacturer's authorized representative" (537 F.2d at 1011) or "to designate the location . . . for which a trade mark license is issued" (*id.* at 1012-13). That right would not permit the franchisor to forbid the opening of unauthorized locations. The court of appeals properly characterized this argument as "highly artificial and even spurious" (*id.* at 994 n. 22). The right to grant a franchise for a specific location, without the corollary right to preclude the franchisee from conducting essentially the same business in the franchisor's product at other, unauthorized, locations, is wholly illusory.

3. The minority concedes that "*Schwinn* expressly ordains the exclusive dealership to be an acceptable practice, as do cases on which the majority relies . . ." (*id.* at 1013). The majority found in those authorities a compelling basis for not deeming location clauses unlawful *per se,* observing (*id.* at 997-98):

> The accepted principle that a manufacturer may legally grant an exclusive dealership is rendered

> meaningless if he cannot legally use a location clause to prevent his other dealers from opening their own retail outlets in the same area. If a manufacturer cannot include a location restriction in a franchise agreement, he cannot do what the exclusive dealership cases hold is legal, i.e., promise that "I will not franchise another dealer in your area."

The minority's response is nothing less than astonishing. First, it maintains that exclusive dealerships and location clauses "are clearly distinguishable" from one another (*id.* at 1013); however, the majority's point was not that they are the same, but that they are, in the minority's own term, "interdependent" (*id.*). Next, the minority, noting that exclusive dealerships "serve . . . as the stimulus for active product marketing by dealers, concedes that their utility . . . resides in the ability to manipulate the density of sales outlets" (*id.* at 1014)—a form of "manipulation" of which the minority evidently approves while, at the same time, condemning the means of effecting it. Further, the minority's approval of the right to franchise by location, to "assign . . . spaced locations" and "approve locations" (*id.* at 1013-14) squarely contradicts its *per se* condemnation of Sylvania's location clause; it is a plain reflection, IFA submits, of the minority's tortured and unsuccessful effort to reconcile its position in this case with its realization that "*Schwinn* expressly ordains the exclusive dealership to be an acceptable practice" (*id.* at 1013).

In sum, the minority is unable to answer the majority's contention that exclusive dealerships and location clauses are "interdependent," and that to acknowledge the lawfulness of the former is to concede that the latter cannot be unlawful *per se*.

4. Finally, the minority would reject application of a rule of reason to Sylvania's location clause because, it is said, (a) the clause is contrary to the Sherman Act's purpose because it restrains dealer freedom (*id.* at 1018-22), and (b) the courts may not "weigh the loss of intrabrand competition against an alleged gain in interbrand competition" (*id.* at 1024). Both contentions reflect circular reasoning; they assume rather than demonstrate that a *per se* standard of illegality applies. If the rule of reason is the proper standard, then consideration of interbrand competition is not only permissible but essential. As this Court stated in sustaining certain of Schwinn's distribution practices under the rule of reason, "[a]pplication of the rule of reason here cannot be confined to intrabrand competition . . ." (388 U.S. at 382). And, of course, if the location clause is sustained under a rule of reason analysis, then by definition it will have been found *not* to be contrary to the purposes of the Sherman Act.

Thus, neither concern of the minority precludes a rule of reason analysis of Sylvania's location clause or warrants the draconian and undiscriminating rule of *per se* invalidation. The majority correctly refused to extend the *Schwinn per se* rule to Sylvania's arrangement, and its decision that the rule of reason applies should be affirmed.

II. VERTICAL TERRITORIAL AND CUSTOMER RESTRICTIONS SHOULD NOT BE DEEMED UNLAWFUL PER SE BUT INSTEAD SHOULD BE JUDGED UNDER THE RULE OF REASON.

Although section 1 of the Sherman Act (15 U.S.C. § 1) proscribes "every contract, combination . . . or conspiracy in restraint of trade or commerce," it has long been recognized that the proscription applies only to restraints which are found to be unreasonable. *Stand-*

ard Oil Co. v. *United States,* 221 U.S. 1 (1911). Application of the "rule of reason" requires consideration of the setting in which the restraint occurs, its purpose, "the nature of the restraint and its effect, actual or probable," to determine its impact on competition. *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918).

Such an inquiry may, however, be dispensed with in the case of *per se* offenses, "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 5 (1958). *Per se* treatment is very sparingly invoked; "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 607-08 (1972).

In *Schwinn,* this Court for the first time applied a *per se* standard to vertical, non-price, territorial and customer restrictions incident to "sales," while judging identical restrictions in cases of "consignment" under the rule of reason. "Perhaps no decision in the annals of antitrust has evoked more criticism,"[1] and the judicial difficulties *Schwinn* has produced are mirrored in the sharp division in the court of appeals in the instant case.

IFA believes that, after nearly ten years' experience with *Schwinn,* its *per se* rule ought to be reexamined. IFA further submits that application of a *per se* stand-

[1] Robinson, *Recent Antitrust Developments,* 75 Colum. L. Rev. 243, 270 (1975).

ard to vertical customer and territorial restrictions is unsound as a matter of antitrust policy, and that the courts should judge them instead under the rule of reason.

A. Schwinn's Per Se Rule Should Be Reconsidered Because It Is Unsound as a Matter of Antitrust Policy and Has Generated Confusion and Uncertainty.

There are three principal reasons why the *per se* rule of *Schwinn* has been so heavily criticized.[2]

First, the conditions which traditionally have been prerequisites to an addition to the limited category of *per se* offenses were absent in *Schwinn.* Only four years earlier, this Court had declined to apply a *per se* standard to such restraints, declaring (*White Motor Co.* v. *United States,* 372 U.S. 253, 261, 263 (1963)):

> This is the first case involving a territorial restriction in a *vertical arrangement;* and we know too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us.
>
> * * * *
>
> . . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" . . . and therefore should be classified as *per se* violations of the Sherman Act. (Emphasis in original.)

Coming only four years later, the *Schwinn per se* rule did not seem a product of "considerable [judicial]

[2] For a bibliography of the critical literature, *see* Robinson, *supra* n. 1 at 272 n. 182.

experience" (*United States* v. *Topco Associates, Inc.*, *supra*, 405 U.S. at 407 with such restraints and a clear demonstration that they inevitably have a "pernicious effect on competition and lack . . . any redeeming virtue." *Northern Pacific Ry.* v. *United States, supra*, 356 U.S. at 5.

The announcement of a *per se* rule came as a surprise;[3] "[i]t also swept aside a venerable body of law sustaining such restraints under the traditional rule of reason as legitimate means for fostering effective interbrand competition."[4]

Second, *Schwinn*'s stated rationale for applying a *per se* rule to sale transactions—"the ancient rule against restraints on alienation" (388 U.S. at 380)—was unpersuasive. It appeared to ignore entirely the

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[3] The *per se* issue was not presented by the parties or fully briefed and argued in this Court. In fact, the opinion noted (388 U.S. at 368): ". . . the United States has abandoned its contention that the distribution limitations are illegal *per se*. Instead we are asked to consider those limitations in light of the 'rule of reason.'"

[4] Robinson, *supra* n. 1, at 270. The decision is also ambiguous. The Court at once seems to establish a *per se* rule for sale transactions and to utilize a rule of reason analysis of the distribution system which contained the challenged restraints. Mr. Justice Stewart, dissenting, observed that the lower court in *Schwinn* had concluded that the territorial restrictions "were the product of a horizontal conspiracy between wholesalers. The District Court found 'a division of territory by agreement between the distributors . . . horizontal in nature'" (388 U.S. at 390). The district court did not rule that vertical territorial restraints were *per se* illegal. Mr. Justice Stewart believed that the majority had overlooked the fact that the district court had merely condemned a horizontal restraint. It is possible that the majority intended only to apply the *per se* rule to Schwinn's customer restrictions which arose from the same distribution arrangements that produced the horizontal territorial restrictions which the district court had condemned.

ancillary restraints doctrine,[5] and, perhaps more importantly, it seemed "a wooden and irrelevant formula" unrelated to a meaningful antitrust analysis of "vertical distributional restraints in the American economy today."[6] Further, invoking "the ancient rule" furnished little insight into the standards which were to govern in cases not involving the sale and resale of fully manufactured items (for example, service franchises, trademark and copyright licenses, or the sale of components or ingredients for processing).[7]

The third defect of *Schwinn*, which arose from the Court's reliance on "the ancient rule against restraints on alienation," was the anomalous treatment accorded to the same restraint depending on whether it arose in the context of a "sale" or a "consignment"; the former was unlawful *per se*, the latter to be tested under the rule of reason. Thus, form, not an analysis of competitive effect, was to govern.

No aspect of *Schwinn* has been more severely criticized. "The majority offered no explanation why the mere passage of ownership in the goods could convert

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[5] 388 U.S. at 391-92, 394 (Stewart, J., dissenting); *see also* Robinson, *supra* n. 1 at 271: ". . . it is doubtful that an undeviating rule against such restraints ever existed, even at common law . . . ."

[6] 388 U.S. at 392 (Stewart, J., dissenting).

[7] *See* Robinson, *supra* n. 1 at 275; *see also* Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?*, 44 Antitrust L.J. 537,538 (1975). This was, of course, not the only source of confusion in *Schwinn*. *See, e.g., Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1315 (5th Cir. 1976): "The post-*Schwinn* treatment of the 'firm and resolute enforcement' language of the Court has followed an erratic course." With respect to the "without more" language of the majority opinion in *Schwinn*, *see Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932 (3d Cir.), *cert. den.*, 400 U.S. 831 (1970); *Tomac, Inc.* v. *Coca-Cola Co.*, 1976-2 Trade Cas. ¶ 60,998 (C.D. Cal. 1976); *Booth Bottling Co.* v. *Beverages International, Inc.*, 361 F. Supp. 340 (E.D. Pa. 1973).

distribution arrangements which were found to 'preserve . . . competition' into restrictions which destroy it."[8] Interbrand competition is heavily relied on by the Court in treating consignments under the rule of reason; if a sale occurs, interbrand competition is to be ignored. The commercial implications of the form of a transaction generally are determined by the contracting parties, often on the basis of custom in the trade, and may vary from setting to setting.[9] However important, they are irrelevant in assessing the competitive impact of the restraint in question. Yet, *Schwinn* makes the form of the transaction controlling—an approach characterized by the present head of the Antitrust Division of the Department of Justice as "an exercise in barren formalism" and "unsound antitrust policy."[10]

For these reasons. *Schwinn*'s harsh and inflexible *per se* rule has fostered not certainty and judicial economy but confusion and a plethora of litigation.[11] It appears "artificial and unresponsive to the competitive needs of the real world."[12] The issue here is not whether these vertical restraints should always be deemed lawful; it is, rather, whether or not the courts

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[8] Robinson, *supra* n. 1 at 271.

[9] "Consignment" may be but one of several means of extending credit to a dealer. Risk of loss due to market fluctuation or casualty may not coincide with passage of title but instead determine who has responsibility for obtaining insurance. And a manufacturer who parts with "title" hardly has parted with the "risk" of losing the good will of consumers if the product is poorly distributed or serviced.

[10] Baker, *supra* n. 7 at 537.

[11] For a summary of the judicial experience, *see* Robinson, *supra* n. 1 at 272-75; *see also* A.B.A., *Antitrust Law Developments* 26 (1975).

[12] Baker, *supra* n. 7 at 537.

should be prevented from examining their competitive effect. The *Schwinn per se* rule presently bars such an examination. The rule, and the problems it has spawned, should be reconsidered.

B. A Per Se Rule for Vertical Territorial and Customer Restrictions Is Unwarranted and Inappropriate.

The antitrust concept of *per se* illegality is by definition inflexible. If a restraint is deemed to be a *per se* violation, it is unlawful regardless of its purpose or economic effect.

Application of an overbroad or poorly considered *per se* rule may thus disallow many socially valuable and economically meritorious transactions. Accordingly, the principle of *per se* illegality has always been viewed as a narrow exception to the traditional antitrust "rule of reason" analysis. As this Court has recognized, formulations of *per se* rules are appropriate only for "naked restraints of trade with no purpose except stifling of competition" (*White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963)), and that determination is not lightly undertaken. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972). Thus, *per se* rules are applied only where the courts have found over the years, by experience and analysis, that a particular, well-defined trade practice is utterly without justification, thereby making a factual inquiry into its economic impact irrelevant.

With respect to vertical territorial and customer restrictions, the criteria for adopting a rule of *per se* illegality have simply *not* been met. As discussed more fully below, such restrictions are not "naked re-

straints" among competitors, but instead are "ancillary" to the overall business relationship between a franchisor and his dealers. Moreover, these types of restrictions can, and indeed do, serve many legitimate and economically desirable business purposes which are decidedly pro-competitive or socially beneficial.

1. Verticle Territorial and Customer Restrictions Are "Ancillary" Rather Than "Naked" Restraints.

The distinction between "naked" restraints of trade, designed solely to hinder competition, and other restrictions which are "ancillary" to a legitimate business purpose was articulated in the earliest decisions applying the Sherman Act. *E.g., United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). The classic *per se* rules developed by this Court—those involving price-fixing agreements among competitors, horizontal market division and group boycotts—are directed against restraints which clearly fall within the "naked" classification. These types of agreements involve combinations of direct competitors designed solely to restrict production or maintain prices. The prospect for offsetting economic efficiencies resulting from such arrangements is nil. They are appropriately subject to *per se* treatment. *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958).

Vertical territorial and customer restraints, on the other hand, arise out of a much different economic context. Such limitations on intrabrand competition may have the effect of fostering interbrand competition by enhancing the competitive ability of the fran-

chisor.[13] Territorial or customer restrictions imposed upon dealers by the franchisor, in the exercise of its business judgment, are ancillary to the primary objective of achieving effective distribution of the franchisor's products or services in the competitive marketplace.

In many cases, the relationship between the franchisor and its dealers involves patent, trademark or some similar form of licensing. Many lower court decisions both before and after *Schwinn* refused to apply a rule of *per se* illegality to vertical customer and territorial restrictions which are reasonably ancillary to such licensing arrangements. Indeed, petitioners apparently concede that such restrictions are not *per se* violations of the antitrust laws and ackowledge that a "manufacturer may . . . use a location clause to protect its good will, and its property rights in its name and mark" (Pet. Br. 47-48).[14]

The same arguments which support ancillary restrictions in the vertical licensing context, however, also apply to more general vertical territorial and customer restraints. In each case, the franchisor seeks to achieve

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[13] *See* Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market Division II*, 75 Yale L.J. 373, 402 (1966).

[14] In attempting to avoid application of this principle to the instant case, petitioners seem to argue that because Sylvania did not grant exclusive dealerships, it should not be entitled to impose the corollary territorial restriction (Pet. Br. 45). This argument is unsound. Sylvania unilaterally limited the number of dealers in each market; the essence of its "elbow room" policy of spacing dealers was to give each dealer an adequate market in order to justify his commitment to Sylvania products. The location restriction was clearly ancillary to this policy.

an efficient distribution system in order to compete more effectively against similar products and services of other manufacturers, thereby achieving the economic goal of interbrand competition. Indeed, this is the manufacturer's sole objective and the restraint is thus clearly an ancillary one. At the same time, the franchisor retains a significant interest in protecting and enhancing the goodwill—reflected in quality and service—associated with its products. Accordingly, vertical restrictions which are reasonably designed to preserve goodwill and increase the efficiency of the distribution process are clearly ancillary restraints.

2. Vertical Territorial and Customer Restrictions May Have Pro-Competitive Benefits.

A *per se* rule against vertical territorial and customer limitations is appropriate only if their anticompetitive effects clearly outweigh their benefits. For example, efforts by manufacturers to impose a uniform resale price on distributors (*i.e.*, vertical price-fixing) have long been held to be *per se* illegal under the Sherman Act. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373 (1911). Significantly, such restraints "reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing products," [15] since distributors are thereby precluded from adjusting their prices to meet interbrand competition.

Vertical territorial and customer restrictions, on the other hand, do not hinder interbrand price competition because each dealer remains free to lower his price in

[15] *White Motor Co.* v. *United States*, 372 U.S. 253, 268 (1963) (Brennan, J., concurring, emphasis in original). *See also*, Note, *Territorial Restrictions and Per Se Rules—A Re-evaluation of the Schwinn and Sealy Doctrines*, 70 Mich. L. Rev. 616, 638-39 (1972).

response to competition from other products. Moreover, those restrictions frequently have positive benefits. For example, a system of territorial exclusivity eliminates wasteful duplication of sales effort and encourages each dealer to develop his marketing area for the franchisor's product to the maximum extent. Dealers have an incentive to engage in merchandising and furnishing point-of-sale services; to undertake costly training of sales and service personnel; to handle complaints; and to provide post-sale services, knowing that the money and sales effort thus expended can likely be recaptured through future sales in the territory. Such activities, especially specialized selling and servicing techniques, often are essential to maintain good will and to preserve the competitive position of the franchisor's product.

In the absence of a territorial limitation a particular dealer may seek to take a "free ride" on the market development work of his intrabrand rivals. In these circumstances the other dealers have little motivation to continue their sales and servicing efforts.[16] Without some form of territorial exclusivity, moreover, dealers may compete only for the largest accounts and leave smaller customers unserviced.[17]

[16] Warren, *Economics of Closed-Territory Distribution*, 2 Antitrust L. & Econ. Rev. 111,116 (1969):

> There is good reason to believe that the promise of freedom from intraband competition is in fact . . . essential to induce the dealer to promote the product in certain ways. Without such a promise of closed-territory distribution, the dealer is less assured that some of these forms of promotion will bring adequate returns.

[17] Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards*, 30 Law & Contemp. Prob. 506 (1965).

Vertical restrictions may also be justified in particular circumstances. With respect to new products, new firms, failing companies and products which require substantial capital investment for distribution, the franchisor may need to grant territorial exclusivity in order to attract dealers willing to handle the products. Indeed, in *Schwinn,* the Court recognized that such restrictions may be necessary for the "newcomer," a "failing company," or in other similar "appropriate and compelling competitive setting[s]" (388 U.S. at 374, 379).

Vertical intrabrand restraints may also be necessary in certain industries to solve peculiar and unique distribution problems. In the soft drink industry, for example, it has been found that territorial exclusivity facilitates the use of returnable bottles, which is not only environmentally desirable but also permits delivery of the product to the consumer at a substantially lower cost.[18] Similarly, a customer restriction confining a distributor of beauty care products to professional beauticians and barbers has been upheld as necessary to minimize product liability exposure and protect consumer health and safety.[19]

In sum, vertical territorial and customer limitations have the potential to promote many social and business benefits. Accordingly, a *per se* rule is wholly inappropriate.

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[18] *The Coca-Cola Co.*, 3 Trade Reg. Rep. ¶ 21,010 (FTC Ad. Law Judge 1975).

[19] *Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970).

3. The Variety of Vertical Territorial and Customer Restrictions Precludes Formulation of a Per Se Rule.

A broad *per se* rule for vertical distribution limitations would condemn indiscriminately a wide variety of practices. Each of these practices, in the context of the particular industry in which it is applied, may have benefits which far outweigh any anti-competitive effects.

Territorial restrictions alone may take many different forms. They may be cast as an absolute limitation, a profit passover arrangement, a location clause, or an area of primary responsibility. *See Sylvania, supra,* 537 F.2d at 995 n. 25. Similarly, customer limitations may distinguish between wholesale or bulk transactions as opposed to retail sales, or differentiate specific classes of potential accounts on a governmental, professional or similar basis. All these forms of restrictions may be associated with trademark, know-how, patent or copyright licensing. Such restrictions may be adopted to meet the peculiar need of a specific industry. Their impact in that context may be highly pro-competitive or socially beneficial, even though the same restraint, in another industry, may be anti-competitive.

A rigid, *per se* rule cannot take account of this wide range of differing practices utilized in many disparate industries. Rather, those practices should be tested by the traditional rule of reason analysis, which permits particularized consideration of their competitive impact.

4. PER SE CONDEMNATION OF VERTICAL TERRITORIAL AND CUSTOMER RESTRAINTS HAS FOSTERED VERTICAL INTEGRATION.

In *Schwinn,* this Court suggested that "a *per se* rule . . . applied to prohibit all vertical restrictions of territory and all franchising" might "sharply accelerate the trend toward vertical integration of the distribution process" (380 U.S. at 379-80).

The Court's observation was very much on target. The *per se* rule, when it has been applied to vertical territorial or customer restraints, has had precisely that anti-competitive effect.

The experience of Schwinn itself is illustrative.[20] Only about 25 percent of its sales were affected by the decision, yet it determined that to market its product effectively in the real business world it must retain a degree of control over the marketing of 100 percent of its production which the decision prohibited. Prior to the litigation, Schwinn distributed through 22 independent wholesalers. At the time of the entry of the final decree in the district court, the number of Schwinn wholesale distributors had been reduced to 18. Moreover, the company had announced that it would assume the wholesale function, eliminating all of the independent distributors. Schwinn's vertical integration was implemented shortly thereafter.[21]

[20] The Government had expressed confidence, in its brief in *Schwinn*, that it was not likely that the company would integrate vertically. It stated (Brief for United States at 28-29):

> Schwinn has not shown that its outlet restriction is necessary to meet the competition of integrated bicycle manufacturers—so far as appears, there are none. And Schwinn is unlikely to integrate into wholesaling and retailing if the contractual arrangements here challenged are barred, in view of the heavy expense such a course would entail and the lack of competitive necessity therefor.

There is, in our economy, a strong trend toward selective distribution of the type utilized by both Schwinn and Sylvania. An ever-increasing number of manufacturers are concluding that distribution through a limited group of distributors and dealers, who will effectively promote and market the manufacturer's product and provide necessary service, is essential to effective marketing. Inherent in the concept of selective distribution are some limitations on the marketing decisions of distributors and dealers. Schwinn had to limit sales by its distributors to franchised dealers; Sylvania must limit the locations from which its dealers may sell its products. As noted above, the arrangements between franchisor and franchisee take many different forms but achieve substantially the same substantive effect. *See* pp. 14-16, 19, *supra.*

If the law is out of step with essential elements of selective distribution, businessmen have but two choices: vertically integrate or go out of business. Schwinn chose the former; Sylvania and others might well have to choose the latter.[22]

[21] *See* Keck, *The Schwinn Case,* 23 Business Lawyer 669, 686-87 (1968).

[22] Vertical territorial and customer limitations also serve the social goal of the antitrust laws to protect small business units. *See United States* v. *Aluminum Co. of America,* 148 F.2d 416, 429 (2d Cir. 1945). In many industries, an exclusive territory may be the only alternative to vertical integration. *See Schwinn, supra,* 388 U.S. at 386-88 (Stewart, J., dissenting).

C. The Rule of Reason Applies to Comparable Restraints and Should Govern.

Until *Schwinn,* resale price fixing was the sole vertical restriction which was deemed to be *per se* unlawful. After "considerable experience," this Court concluded that resale price fixing by agreement was properly categorized as a *per se* violation. *See, e.g., United States* v. *Colgate,* 250 U.S. 300 (1919); *United States* v. *Parke Davis & Co.,* 363 U.S. 29 (1950).

Prior to *Schwinn,* all other vertical restraints were judged under the rule of reason. Perhaps the oldest and most common vertical restraint is the exclusive dealership or franchise: the manufacturer agrees that he will not establish another dealership in the dealer's sales territory. Sometimes, the manufacturer imposes this restraint upon itself, typically in order to induce the requisite financial commitment and market development effort by its dealers. *See, e.g., Sandura Co.* v. *FTC,* 339 F.2d 847 (6th Cir. 1964); *Snap-On Tools* v. *FTC,* 321 F.2d 825 (7th Cir. 1963). In a market of increasingly larger, integrated wholesaler-retailers, exclusive dealerships are often imposed by the buyer upon the seller.

The exclusive dealership is a form of restriction which may significantly restrain trade. It interferes with the manufacturer's freedom to choose customers, forecloses any other person from becoming a distributor in the territory and, as a practical matter, may prevent retailers within the territory from buying from any other distributor. Exclusive dealerships have nonetheless, and accurately, been characterized as *per se legal,* unless the manufacturer is a monopolist. *See Packard Motor Car Co.* v. *Webster Motor Car Co.,*

243 F.2d 418 (D.C. Cir.), *cert. denied,* 355 U.S. 822 (1957).

A second vertical restraint is exclusive dealing: the dealer agrees that he will sell only the manufacturer's product line or that he will not sell competitive products. The validity of exclusive dealing agreements is tested under a rule of reason by analysis of the extent to which the market is foreclosed to competing manufacturers. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320 (1961).

A form of exclusive dealing that has developed in modern franchising is the in-term covenant not to compete—an agreement by the franchisee not to engage in a similar business under either another franchise or his own name during the term of his franchise. This restriction is also tested under the rule of reason. *See American Motor Inns, Inc.* v. *Holiday Inns, Inc.,* 521 F.2d 1230 (3d Cir. 1975).

Another category of vertical restraint is the wide variety of restrictions designed to concentrate the efforts of a dealer in a specified territory. These arrangements include exclusive territories, location restrictions, areas of primary responsibility, quotas and profit passover requirements. They complement exclusive dealerships; a manufacturer must concentrate the marketing efforts or locations of each dealer in order to insure the benefits of an exclusive dealership to any dealer. All such restraints are tested under the rule of reason.[23]

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[23] Until 1948, all non-price vertical restrictions were unchallenged. Thereafter, a number of manufacturers entered into consent decrees with the Government which prohibited territorial restraints, but generally permitted location restrictions and areas

A final category of vertical restraints is customer restrictions. Such restrictions are occasionally utilized to reserve specialized accounts for direct sales by the manufacturer.[24] However, they are primarily an adjunct of selective distribution and franchise systems. If a manufacturer determines that its products can be most effectively marketed through selected authorized distributors and dealers, it must implement that marketing plan by requiring that distributors sell only to authorized dealers and prohibiting authorized dealers from selling to unauthorized dealers.

In sum, the rule of reason applies to the primary restraints of exclusive dealerships—the purpose and effect of which is to "space" dealers and insulate them to a degree from intrabrand competition—and to exclusive dealing—which reduces interbrand competition. Both exclusive dealerships and exclusive dealing have the capacity to restrain competition substantially. Yet this Court has never hesitated to permit their legality to be tested under the rule of reason. If the lower courts can be entrusted with the task of applying a rule of reason standard to such restraints of trade, they should be afforded the same latitude in assessing the territorial and customer restraints considered in *Schwinn* and in this case.

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of primary responsibility. White Motor Company refused to settle the Government's claim, resulting in summary judgment for the Government in the district court and a reversal by this Court with instructions to establish a record that would permit an analysis of the effects of such restrictions on competition. *White Motor Co.* v. *United States*, 372 U.S. 253 (1963).

[24] *See, e.g., Snap-On Tools* v. *FTC*, 321 F.2d 825 (7th Cir. 1963).

D. The Courts Are Fully Capable of Applying a Rule of Reason Standard to Vertical Restraints and Fashioning Flexibile Rules Consistent with Economic Reality.

The minority below argued that the courts are not the appropriate arbiters of economic policy issues and that it is inappropriate for them to attempt to weigh the relative merits of interbrand and intrabrand competition (*see* 537 F.2d at 1018-29, Browning, C.J., dissenting). IFA submits that this argument is fundamentally unsound, as Judge Duniway pointed out in his brief dissent. He was (*id.* at 1030)

> . . . puzzled by the notion that because the courts are not very well equipped to decide between conflicting notions of economic policy, they should pick one side of such an argument and erect it into a rule of *per se* illegality.

In fact, Congress did not distinguish between intrabrand and interbrand competition. Congress declared that restraints of trade are unlawful. This Court has interpreted that legislative pronouncement to mean that unreasonable restraints, not all restraints, are unlawful. Congress has charged the courts to protect competition. The rule of reason is an analytical tool to achieve that end. In the context of vertical restraints, it is neutral favoring neither interbrand nor intrabrand competition. A *per se* rule, however, favors intrabrand competition, for it forecloses inquiry into the impact of a vertical restraint on interbrand competition, which may well be the most significant form of competition. Thus, if the courts declare vertical restraints to be *per se* unlawful without regard to their overall impact on competition, they fail to meet their responsibility to uphold competition. By contrast, when the courts analyze the impact of a ver-

tical restraint on both interbrand and intrabrand competition, they do no more than Congress has charged them to do. As this Court noted in *Schwinn* (388 U.S. at 382), "[a]pplication of the rule of reason here cannot be confined to intra-brand competition."

Petitioners, relying upon *Topco,* argue that it is not the proper role of the judiciary to "set sail on a sea of speculation in a prophetic effort to tell whether the resulting inquiry [to intrabrand competition] is offset by asserted benefits to interbrand competition" (Pet. at 14). *Topco,* however, was concerned with horizontal, not vertical, restraints (405 U.S. at 608). Horizontal allocation of sales territories has long been classified as *per se* unlawful. *See Timken Roller Bearing Co.* v. *United States,* 341 U.S. 543 (1951). The statements in the Court's opinion in *Topco* regarding the difficulty of weighing destruction of competition in one sector of the economy against promotion of competition in another sector must be read in light of the nature of the restraints at issue in *Topco* and the asserted justification for those restraints. Topco argued that its territorial restrictions enabled Topco members to compete more effectively against the private brands of supermarket chains (405 U.S. at 605). But the horizontal territorial allocation of the Topco system not only foreclosed competition between Topco members in Topco brand products, it had the practical effect of foreclosing competition between them in all other products which Topco stores carried. The horizontal territorial allocation in the Topco system thus reduced significantly both intrabrand and interbrand competition.

Vertical restrictions present an entirely different analysis from that which this Court rejected in *Topco.*

The typical inquiry in the case of vertical restrictions is the extent to which intrabrand competition is diminished and whether such restrictions are essential to attract effective dealers who thereby become effective interbrand competitors. *See Tomac, Inc.* v. *Coca-Cola Co.,* 1976-2 Trade Cas. ¶ 60,988 (C.D. Cal. 1976).

This case illustrates the point perfectly. The uncontradicted evidence is that Sylvania had a one-to-two percent share of the market under its restriction-free distribution system and tripled its share to five percent after it adopted an "elbow room" policy. Before it adopted that policy, Sylvania was in serious danger of dropping out of the television set market which is dominated by Zenith and RCA. *See* 537 F.2d at 982. With its implementation, Sylvania became a significant competitor in that market (*id.* at 982-83). Interbrand competition in the product of a company with a one-to-two percent market share is far less significant than the interbrand competition afforded by a company that triples its market share by means of vertical restrictions.

The courts presently apply a rule of reason standard to exclusive dealerships,[25] exclusive dealing,[26] areas of primary responsibility,[27] profit passover requirements,[28]

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[25] *See, e.g., Packard Motor Car Co.* v. *Webster Motor Car Co.,* 243 F.2d 418 (D.C. Cir.), *cert. denied,* 355 U.S. 822 (1957).

[26] *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320 (1961).

[27] *See* final decrees in *United States* v. *Arnold, Schwinn & Co.,* 1968 Trade Cas. ¶ 72,480 (N.D. Ill. 1968); *United States* v. *Topco Associates, Inc.,* 1973-1 Trade Cas ¶ 74,391 (N.D. Ill. 1973).

[28] *See Superior Bedding Corp.* v. *Serta Associates, Inc.,* 353 F. Supp. 1143 (N.D. Ill. 1968).

location restrictions,[29] and both horizontal and vertical mergers.[30] Tying arrangements, although sometimes described as illegal *per se*, involve a determination whether the defendant has sufficient market power over the tying product and whether a lesser restraint could achieve the necessary quality control or trademark protection.[31] Only price-fixing, horizontal allocation of sales territories or customers, and boycotts are true *per se* offenses. The courts are thus required to apply a rule of reason analysis to a wide variety of trade restraints, to consider their competitive impact and determine whether they are unreasonable and therefore unlawful. The decision to remove a class of restraints from the rule of reason category and place it in the *per se* category is not based on the inability of the courts to assemble and analyze evidence of competitive impact or on the judicial economy of avoiding such inquiries, but upon the conclusion that the restraints have a "pernicious effect on competition and lack . . . any redeeming virtue." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958).

Nor are the courts incapable of fashioning analytical rules for assessing the competitive impact, and ultimately the reasonableness, of vertical territorial and customer restraints. The courts are continually pre-

[29] *See Salco Corp.* v. *General Motors Corp., Buick Motor Div.*, 517 F.2d 567 (10th Cir. 1975); *Kaiser* v. *General Motors Corp.*, 396 F.Supp. 33 (E.D. Pa. 1975), *aff'd*, 530 F.2d 964 (3d Cir. 1976).

[30] *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974) (horizontal); *United States* v. *Marine Bank Corp., Inc.*, 418 U.S. 602 (1974) (horizontal); *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962) (vertical).

[31] *Fortner Enterprises, Inc.* v. *United States Steel*, 394 U.S. 495 (1969).

sented with factual and legal determinations under antitrust law which are at least equally complex. The courts must, for example, determine what constitutes a relevant market or submarket (involving such economic and marketing questions as interchangeability of use and cross-elasticity of demand), the extent of the market foreclosure of an exclusive dealing agreement, whether there has been an attempt to monopolize and a dangerous probability of a successful attempt, and whether a merger may tend to reduce or promote competition. Indeed, this Court's analysis of Schwinn's marketing system and the inquiry by the court of appeals below into the historical basis for and operative effect of Sylvania's "elbow room" policy amply demonstrate the ability of the courts to apply the rule of reason to vertical restraints.

Finally the nature of the inquiry into the reasonableness of a vertical territorial restraint is well understood. The factors to be assessed include the relative significance of intrabrand and interbrand competition in the market—whether the manufacturer dominates its market, or, like Sylvania, has a relatively small market share and faces larger and more vigorous competitors;[32] the extent to which intrabrand com-

[32] The reasonableness of an exclusive dealing agreement depends upon the degree to which it forecloses the market to competing sellers. The reasonableness of territorial restraints depend, at least in part, on the manufacturer's share of the market. The larger the share, the more dependent the market is on intrabrand competition in the manufacturer's product, and the less likely that the territorial restriction is necessary or can be justified by its beneficial effect on interbrand competition. It is one thing for Sylvania to restrict intraband competition in order to improve its effectiveness as an interbrand competitor. It would be quite another for RCA or Zenith to do so, for they are market leaders, and overall competition in the market would be damaged by the diminution of intrabrand competition in RCA or Zenith products.

petition is diminished by the territorial restraint; the market factors which led to the adoption of the restrictive practices; whether the territorial restriction is accompanied by other restrictions, such as exclusive dealing, that diminish interbrand competition; and, whether the territorial restriction is reasonably necessary to promote effective dealer marketing efforts and service, thereby enhancing interbrand competition.

The courts presently apply a rule of reason standard to many common marketing techniques, such as exclusive dealerships, exclusive dealing, and a number of restrictions on distributors and dealers that insulate them to some degree from intrabrand competition. The courts are fully capable of applying the rule of reason to all vertical territorial and customer restraints. There is no sound reason to foreclose them from doing so.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed, and the *per se* rule announced in *Schwinn* should be replaced by the rule of reason.

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MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A&G SALES, SYLPAC AND S.A.M. INDUSTRIES, INC., *Petitioners,*

v.

GTE SYLVANIA, INCORPORATED, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE ASSOCIATED EQUIPMENT DISTRIBUTORS

AND

BRIEF AMICUS CURIAE ON BEHALF OF THE ASSOCIATED EQUIPMENT DISTRIBUTORS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE ASSOCIATED EQUIPMENT DISTRIBUTORS

The Associated Equipment Distributors ("A.E.D.") respectfully moves for leave to file a brief *amicus curiae* in support of Respondent.* In support of this motion the Associated Equipment Distributors states as follows:

1. The Associated Equipment Distributors is a national trade association composed of approximately 900 independent companies which distribute construction and related equipment throughout the United States.

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* Pursuant to Rule 42 of the Rules of this Court, the Associated Equipment Distributors requested consents from all parties to the filing of a brief *amicus curiae*. Counsel for Petitioner declined to grant such consent; Counsel for Respondent stated that in view of Petitioner's refusal to give consent, he would take no position concerning AED's filing of a brief *amicus curiae*.

A.E.D. members also service and repair new and used construction equipment at their facilities or at construction sites where the equipment is used. Most A.E.D. member companies hold franchises from manufacturers of construction equipment to distribute one or more lines of construction equipment. As a matter of practice, a substantial number of construction equipment franchisees are the exclusive distributors of the manufacturer's products within a defined territory or trade area. Some franchise agreements specify the distributor's location as the place where the franchise is granted. These agreements, while not placing geographic restrictions on sales, do require notification to and approval by the manufacturer before the location may be changed or before any equipment may be sold at other sites.

2. As explained above, the trade practices generally utilized in the construction equipment distribution industry entail exclusive distributorships and location restrictions and are, in these respects, strikingly similar to those under consideration in this instant case. The Court's decision in this case—whether a distribution system incorporating location restrictions is *per se* illegal—is therefore of utmost concern to A.E.D. as it will largely determine the legality of the industry's method of operations.

3. A.E.D. believes that it is essential to present to the Court the views of the small, independent distributors represented by the Associated Equipment Distributors. The Respondent, whose position A.E.D. supports, is a manufacturer and therefore unlikely to be able to adequately present to the Court the arguments and concerns that should be made on behalf of distributors.

For the foregoing reasons, the Associated Equipment Distributors respectfully requests leave to present its views by filing a brief *amicus curiae* in support of Respondent.

Respectfully submitted,

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BRIEF AMICUS CURIAE ON BEHALF OF THE ASSOCIATED EQUIPMENT DISTRIBUTORS

This brief *amicus curiae* on behalf of the Associated Equipment Distributors is submitted contingent upon the Court granting the accompanying Motion of the Associated Equipment Distributors for leave to file a brief *amicus curiae.*

INTEREST OF THE AMICUS CURIAE

The interest of the Associated Equipment Distributors is set forth in its annexed motion for leave to file a brief *amicus curiae.*

SUMMARY OF ARGUMENT

The adoption of a *per se* rule of illegality to location restrictions will have a lethal effect on the franchise and independent dealer distributorship operations commonly found in the construction equipment distribution industry. A *per se* rule will preclude distributors from obtaining exclusive franchises and as a result distributors will be unwilling or unable, because of the financial commitment required, to effectively distribute complex and expensive construction equipment. This will have the anti-competitive effect of reducing the number of distributors, encouraging the growth of a few large distributors, compelling manufacturers to integrate the distribution process into their operations and forcing other manufacturers out of business unless an alternative distribution system can be found. Unless this court is prepared to inter the exclusive franchise concept it must affirm the court's decision below.

This case is not controlled by this Court's decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); nor should *Schwinn* be extended to the trade practices at issue here. Moreover, the *per se* aspects of *Schwinn* are in the nature of *dicta* since that issue was admittedly not before the Court and was neither briefed nor argued. In any event, the Court should recede from any implication that the *per se* rule of *Schwinn* applies to location restrictions since the alienation of property principle relied on in *Schwinn* has no relation to anti-trust considerations. Additionally, extension of a *per se* rule here would ignore both policy considerations established by Congress in the Lanham Act and the effect this decision will have on

the position of manufacturer and distributor under other laws.

The location restrictions at issue here have neither a pernicious anti-competitive effect nor lack any redeeming virtue. Therefore they do not meet this Court's test for *per se* illegality and must be judged under the rule of reason. The application of the rule of reason test will not render the lawfulness of such restrictions unpredictable; nor will it impose untoward obligations on the judiciary simply because it requires the courts to undertake an analysis of the restrictions in each case.

ARGUMENT

I. Reversal of the Lower Court Decision Will Have Substantial Anti-Competitive Effects and Will Frustrate the Purposes of the Sherman Act.

It is well recognized that a manufacturer of a product has the right to select its customers and may "franchise" specified dealers to whom it sells its goods. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967). The lawfulness of such a distribution system is unaffected if the manufacturer decides to confine its sales exclusively to one franchised dealer in a territory even if this causes the elimination of other distributors. *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 91 (CA9, 1969), cert. denied, 396 U.S. 1062 (1970). The accommodation of such franchising policies to the antitrust laws stems from recognition of the fact that the franchising method of operation affords independent businesses perhaps the only viable means to become efficient and effective competitors of large, vertically integrated giants. *United States* v. *Arnold, Schwinn, supra* 388 U.S. at 386-387 (Stewart, dissenting). A.E.D. submits that the adoption of a rule of *per se* illegality in this case, ignores these accepted principles. Instead, a *per*

se rule will significantly encourage the vertical integration of independent distribution systems and will signal the end of the franchise and independent dealership concept.

These adverse consequences may be illustrated by reference to the construction equipment distribution industry. Manufacturers of construction equipment frequently distribute their products by granting exclusive franchises to dealers at specified locations. In reliance on the exclusive franchise the distributor, who essentially is a small businessman, will borrow and expend substantial sums to build showroom and repair facilities, train service personnel, purchase necessary service equipment and engage in various promotional efforts.[1] Absent the assurance that it will be the manufacturer's exclusive representative, it is unlikely that the distributors would undertake—or be able to obtain financing for—these expenditures.

It is not difficult to see how the imposition of a rule of *per se* illegality to a location clause restriction would sound the death knell for such methods of distribution. Initially, as the court below cogently observed, "under the rule of *per se* illegality, *if a dealer is franchised anywhere he is franchised everywhere.*" 537 F.2d at 998 (emphasis in original). This means that since a manufacturer would be required to sell to a franchised distributor irrespective of its locations, the manufacturer would be unable to guarantee to any dealer the right of an exclusive franchise. Lacking the assurance of an exclusive distributorship, few distributors would agree to expend the enormous resources attendant to purchasing, selling, and servicing complex and expensive construction equipment.

[1] Some of the larger construction equipment distributors have upwards of 7 million dollars invested in plant, equipment, inventory and parts.

The inability to attract a sufficient number of dealers might well confront manufacturers of construction equipment with a serious dilemma concerning the marketing of their products. The most obvious solution to the shortage of dealers would be that manufacturers would vertically integrate the distribution process into their operations with the consequent elimination of those independent distributors remaining in business. However, many manufacturers are financially unable to absorb distribution processes, or for other reasons the distribution processes are unsuited to their operations. These manufacturers face elimination from the market unless they can devise alternative distribution methods. The adoption of a *per se* rule that would produce such consequences—i.e., contributing to the demise of independent distributors and aiding the disappearance of manufacturers—is obviously at odds with the pro-competitive policies imbedded in the Sherman Act and therefore should be rejected.

Moreover, the anti-competitive effects suffered by distributors if the lower court is reversed will not be confined to the aforementioned difficulties in the vertical aspects of the distribution process. There will also be deleterious effects to existing franchised distributors of a horizontal nature. For example, any large, well-financed distributor holding or obtaining a franchise in an undesirable location could immediately enter other more lucrative markets. Such distributors would skim the cream off such markets without incurring advertising, sales or service costs that the exclusive distributor in that location has expended to develop good will and product acceptability for that market. In the final analysis, the larger and more financially sound distributors would, by economics of scale, drive out smaller

distributors until only a few giant nationwide distributors remained. This, in turn, would yield increased centralization, decreased competition, and a net anti-competitive effect—results in fundamental disharmony with the Sherman Act's design of promoting competition.

II. The Court's Decision in United States v. Arnold, Schwinn Should Not Be Extended To Location Restrictions.

The court below refused to extend this Court's decision in *United States* v. *Arnold, Schwinn supra* to Sylvania's location restrictions finding that the factual contexts presented in the two cases were neither "analogous or similar, even remotely." That decision is clearly correct. *Schwinn* involved vertically imposed territorial and customer restrictions that absolutely foreclosed intrabrand competition. Sylvania's "elbow room" practices on the other hand, while limiting a dealer's location, placed no restriction on extraterritorial sales or customers. Combined with Sylvania's practice of franchising competing dealers within any given territory the "elbow room" policy preserved a degree of intrabrand competition far exceeding that found in lawful exclusive dealerships.

Apart from these factual dissimilarities, several additional considerations militate against according *Schwinn* a broad sweep. Initially, *Schwinn's* rule of *per se* illegality must be subjected to special scrutiny since that issue was neither presented nor briefed to the Court.[2] Indeed, Justice Fortas' opinion in *Schwinn* refers at several points to the absence of the *per se* issue before the Court:

[2] See Pollock, *The Schwinn Per Se Rule: The Case for Reconsideration,* 44 Antitrust L.J. 557, 565-566 (1975).

> In this Court, the United States has abandoned its contention that the distribution limitations are illegal *per se*. Instead we are asked to consider these limitations in light of the "rule of reason. . ." 388 U.S. at 1860.

and

> The Government does not contend that *a per se* violation of the Sherman Act is presented by the practices which are involved in this appeal . . . . Accordingly, we are remitted to an appraisal of the market impact of these practices. 388 U.S. at 373.

Not having the *per se* issue before it, the Court's consideration of that issue took place without benefit of the views of all interested parties and must be viewed in the nature of dicta. In such circumstances, serious reservations exist concerning the wisdom of extending the *Schwinn* holding to the trade practices under consideration in this case or in otherwise giving *Schwinn* broad latitude. Indeed, A.E.D. submits that the fact that the *per se* issue was not before the Court in *Schwinn* renders suspect that aspect of the *Schwinn* decision itself.

In any event, assuming *arguendo* that *Schwinn* is sufficiently broad to encompass the location restrictions involved here such breadth should be curbed. The only rationale given by the *Schwinn* court for imposing a *per se* rule to sale transactions was that it would violate "the ancient rule against restraints on alienation . . . ." 388 U.S. at 380. However, there is no inherent relationship, nor does *Schwinn* furnish one, between restraints on alienation and the suppression of competition.

Instead, borrowing freely from the rule against restraints on alienation of property the *Schwinn* court considered it to violate the Act, *per se,* simply if a manufacturer reserved any control once it parted with dominion over the product. Whatever the merits of the alienation of property principle in ancient times, it should not be mechanically incorporated into antitrust legislation and applied to the present day economic structure. Unlike earlier historical periods, today's manufacturers and distributors are vitally concerned with their product after it passes from their control. Manufacturers and distributors expend vast sums on national and local advertising, quality control, repair and servicing facilities. These expenditures are incurred to insure the product's integrity and its continued salability in a national market place. These factors are of great concern to manufacturers and distributors irrespective of whether they retain dominion over the product. Moreover, distributors and manufacturers are becoming increasingly responsible under Products Liability law and Occupational Safety and Health legislation [3] for product defects after title has passed. Accordingly, they must be concerned with the products' destiny once it leaves their hands and necessarily must impose some restrictions during that period. These factors persuasively demonstrate that it would be improper to permit the passing of title to be the litmus test governing whether restrictions on resale are *per se* violative of the Sherman Act.[4]

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[3] Cf. *Frohlick Crane Service, Inc.* v. *OSHRC,* 521 F.2d 628 (CA 10, 1975).

[4] A reversal of the lower court's decision here might also have substantial and adverse impact on the law of trademarks. Federal law provides that a certification mark owner must insure that the product or services identified by the mark meets all owner quality standards or risk cancellation or abandonment of certification rights (15 USC Sec. 1055, 1064(e)(1) (1964). Quality control through the required establishment of extensive and adequate service facilities seems essential to carrying on the obligations of this national policy. While the Lanham Act specifically provides that an antitrust violation is not condoned by the trademark law (15 USC Sec. 115(b)(7)), a mechanical application of the *Schwinn* per se concept here would prevent the dovetailing of the quality control concepts of Lanham and antitrust policy. Indeed, that portion of the trademark law would be rendered inoperative.

Relying on such reasoning, several lower courts have refused to extend the *Schwinn* rationale to cover reasonable product restrictions imposed by the manufacturer after it relinquished dominion to the product. See e.g., *Tripoli & Co.* v. *Wella Corp.,* 425 F.2d 932 (CA 3, 1970), cert. denied, 400 U.S. 831 (1970) (restriction on resale of beauty products intended for professional use because of safety considerations); *Adolph Coors Company* v. *F.T.C.,* 497 F.2d 1178, 1187 (CA 10, 1974) cert. denied 419 U.S. 1105 (1975) (sales to distributors may be conditional on maintenance of conditions necessary to control the quality of the product); *Salco Corp.* v. *General Motors Corp.,* 517 F.2d 567 (CA 10, 1975) (restriction on automobile dealer location). The same reasoning should be applied to location restrictions similar to those at issue here, inasmuch as they have pro-competitive effects and are motivated by legitimate considerations. We respectfully urge the Court therefore to make clear that no implication may be drawn from *Schwinn* that all product restrictions applicable after title passes—and specifically location restrictions—are *per se* unlawful.

III. Since Sylvania's Location Restrictions Are Neither Perniciously Anti-Competitive Nor Without Redeeming Value They Do Not Meet This Court's Test For Per Se Illegality And Therefore Must Be Judged By The Rule Of Reason.

Since *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911) it has been settled that Section 1 of the Sherman Act prohibits only unreasonable restraints in trade. Accordingly, this Court has adopted a "rule of reason" test that is ordinarily employed to measure whether challenged business practices violate the Act. *Standard Oil Company* v. *United States,* supra; *Chicago Board of Trade* v. *United States,* 246 U.S. 231 (1918); *United States* v. *Topco Associates, Inc.,* 405 U.S. 596 (1972). This Court has also recognized another, limited, category of business relationships that violate the Act *per se* without the need for an inquiry into their reasonableness. In order to fall within this *per se* category the challenged activity must consist of conduct which meets the following test:

> "... agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

Northern Pacific R. Co. v. *United States,* 356 U.S. 1, 5 (1958).

Unlike price fixing, tying arrangements, group boycotts or horizontal divisions of markets, Sylvania's "elbow room" distribution system did not meet either half of the two-part test for "*per se*" illegality. It produced neither a "pernicious effect" on competition nor did it lack any "redeeming virtue". To the contrary, as both the record and the Court's decision below make plain, the "elbow room" policy achieved substantial pro-competitive effects and was motivated, not by a desire to "stifle competition",[5] but to enable Sylvania to become an effective interbrand competitor. Lacking the elements that are prerequisite to inclusion in the *per se* category, this Court's decisions require that Sylvania's distribution practices be examined under the rule of reason test. See cases cited *supra* p. 10.

To decline to apply the *per se* label to the location restriction aspect of Sylvania's "elbow room" policy neither immunizes all such arrangements from antitrust liability nor opens a Pandora's box of uncertainties concerning antitrust enforcement. First, notwithstanding the inapplicability of the *per se* rule to location restrictions, the rule of reason stands as sentinel to curb such practices whenever they produce unreasonable anti-competitive effects. As the Court below observed:

> Our choice of a rule of reason test over a *per se* rule of illegality means only that the critical policy question will at least be asked and answered. In our view the Sherman Act demands no less [footnote omitted].

Nor may any perceived difficulties attendant to a rule of reason test justify resort to a *per se* approach. First, the economic analysis required to weigh competitive advantages and disadvantages flowing from vertically imposed location restrictions do not exceed judicial capabilities. Indeed, in at least two cases involving vertical restraints this Court has directed that the analysis be made. See *White Motor Co.* v. *United States,* 372 U.S. 253 (1963) (vertically imposed restric-

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[5] *White Motor Co.* v. *United States,* 372 U.S. 253, 263 (1963).

tions on territory and customers held subject to rule of reason); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (vertically imposed restrictions on territory and customers where manufacturer retained title to product held subject to rule of reason test). The lower court's decision that the trier of fact here undertake a similar analysis entails no more of a burden than that directed in *White Motor* and *Schwinn* and therefore is no less proper.[6]

In any event, the reasons advanced for a *per se* rule —predictability of outcome, ease of application and judicial economy—are insufficient to override a meaningful examination of the effects on competition generated by the challenged practices. The Sherman Act is designed to promote competition by restricting unreasonable restraints of trade. It would be both shortsighted and an affront to the Act's design to foreclose an analysis of the reasonableness and economic effect —both interbrand and intrabrand—in exchange for perceived judicial economies. Indeed, in other fields of law the Court has adamantly resisted suggestions that it avoid making a required analysis because it was difficult, time consuming or not especially amenable to the judicial process. See *Local 761, I.U.E.* v. *NLRB*, 366 U.S. 667, 674 (1961). ("However difficult the drawing of lines more nice than obvious, the statute compels the task") *Franks* v. *Bowman Transportation Company, Inc.*, 424 U.S. 747 (1976) (award of seniority to rem-

[6] *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) does not require a contrary conclusion. *Topco* involved horizontal territorial restrictions, a classic *per se* violation of the Sherman Act. Since the trade practices in *Topco* were historic "naked restraints of trade with no purpose except stifling of competition" the Court properly rejected an inquiry into associated pro-competitive effects. Equivalent considerations are lacking here.

edy employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*). Fulfillment of the antitrust laws requires no less here.

CONCLUSION

For the reasons stated above, as well as those presented by Respondent, the Associated Equipment Distributors urges the Court to affirm the decision of the Court below.

Respectfully submitted,

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No. 76-15

CONTINENTAL T.V., INC., *et al.*,
Petitioners,

v.

GTE SYLVANIA INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF FOR MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

The Motor Vehicle Manufacturers Association (MVMA) respectfully moves the Court for leave to file the attached brief as *amicus curiae* in this case. Counsel for respondent has consented to the filing of the attached brief. The consent of counsel for petitioners was requested but refused.

The interest of MVMA as *amicus curiae* is set forth at pages 1-2 of the attached brief. The brief describes

the benefits of locational franchising to both the manufacturer and the consumer and explains the economic rationale for certain types of vertical relationships. The dealer "location clause" in common use in the motor vehicle industry is used as an example of how business relationships reflect this economic rationale. These matters are not fully discussed in the respondent's brief.

Respectfully submitted,

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BRIEF FOR MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Motor Vehicle Manufacturers Association (MVMA) is a voluntary, nonprofit membership association composed of companies engaged in the production of motor vehicles in the United States. MVMA has often represented the interests of its member companies in both administrative and judicial proceedings.

This case raises important issues about the lawfulness under the Sherman Act of dealer location clauses,

and of the franchise distribution systems that depend on such clauses. MVMA's member companies have a direct and vital interest in the resolution of those issues. Motor vehicle manufacturers distribute their products through independent franchised dealers. Those dealers are franchised to sell the manufacturer's vehicles from specified locations to any customer, wherever he may live or have his place of business. The manufacturer's consent is required for them to change or add selling locations. The dealers are typically not granted "exclusive franchises": The manufacturer is free to locate additional dealers wherever it thinks a new outlet will help it to compete effectively for sales. In fact, automobile manufacturers generally have a number of dealers in every major metropolitan area, and those dealers typically sell throughout the area and beyond.

INTRODUCTION AND SUMMARY

Motor vehicles are complex, costly, mobile, and long-lasting products which require sophisticated pre- and post-sale servicing. The manufacturer's relationship and responsibility to the consumer begin before any purchase is consummated and last for the life of the car. Consumers want and need to be informed before purchase of the characteristics and performance of competing vehicles in order to assure themselves that the financially important choices they are making suit their needs. After the purchase, the consumer wants to have reliable and convenient service available. The manufacturer strives to meet these consumer needs in order to maintain consumer goodwill and thus achieve sales success.

In recent years, the manufacturer's competitive interest in meeting consumer needs has been reinforced by an expanding range of statutory obligations to consumers. Both emission controls and safety devices on a vehicle must meet rigid federal standards. Safety and

emission control defects discovered after sale must be corrected at the manufacturer's expense. In a very real sense, the manufacturer is subject to continuing economic risks that require him to arrange for competent, careful servicing by franchised dealers located conveniently to the owners of the vehicles and equipped with the facilities to discharge this function.

These features of the motor vehicle industry are the basic business realities that make a franchising system with locational restrictions essential.

This *amicus* brief also sets forth the underlying economic principles which support the assertion that the use by manufacturers of vertical restraints on the locations of dealers may be beneficial to competition and consumer welfare. A manufacturer and the consumers of its product want the same thing from a distributional system: maximum effectiveness at minimum cost. Every manufacturer has an economic interest in having its product marketed effectively at the lowest possible cost. The consumer wants a convenient place to buy the product, enough information to make an intelligent choice, and reliable post-sale servicing—all at the lowest possible price. If a dealer incurs unnecessary costs or makes excessive profits, both manufacturer and consumer suffer. The manufacturer loses sales and profits, and the consumer pays higher prices and gets reduced services.

Part I of this brief examines the above propositions in detail and explains the consequences which flow from them. For the motor vehicle industry, a franchise system specifying each dealer's selling location is the most effective and competitive method of distributing and servicing motor vehicles.

Part II of the brief examines prior decisions on the lawfulness of location clauses under the Sherman Act. Such clauses have uniformly been upheld as reasonable, ancillary restraints needed to make locational franchis-

ing work. Every federal court that has confronted the issue has determined that the *Schwinn per se* language has no applicability to this type of vertical arrangement. Petitioners ask this Court to overturn these prior decisions by extending the *Schwinn per se* language to cover location clauses. But they do not and cannot support this plea with reasoned analysis.

If the broadest language of the *Schwinn* opinion is viewed by this Court as being inconsistent with the decisions upholding location clauses under the rule of reason, there is considerable support for a reexamination of *Schwinn* itself. Part III of this brief examines the opinions in *Schwinn* and *White Motor*, and the judicial and scholarly authorities that have strongly criticized the *Schwinn* rationale.

ARGUMENT

I. COMPETITIVE MARKET FORCES MAY REQUIRE A MANUFACTURER TO BE SELECTIVE IN THE NUMBER AND LOCATION OF ITS DISTRIBUTION OUTLETS.

Any manufacturer of a consumer product wants to find and maintain the most efficient, competitively effective method of distributing its product to consumers. This interest coincides with that of the consumer, who naturally wishes to have a choice of products offered to him at the least possible cost consistent with his need for purchasing convenience, quality and convenience of service, and other requisites of effective retail distribution. A manufacturer often finds that the most competitively successful, least costly method of distribution is to sell the product to selected independent ("franchised") dealers operating at specified locations.

The choice of distribution through independent franchised dealers makes particular competitive sense for manufacturers of complex, expensive products requiring

substantial capital investment at the retail level, sophisticated pre- and post-sale servicing, and the communication of accurate operating information to the user at the time of sale and over the lifetime of the product. That has been the unanimous choice, based on experience, of motor vehicle manufacturing firms—whether large or small, domestic or foreign. When the franchising choice is made, and selected independent dealers are established at specified locations, the manufacturer's reasons for so choosing—and the economic results of its choice—are the natural result of market forces and are typically pro-competitive and pro-consumer. If manufacturers were forbidden to select their dealers and specify their locations, and were compelled instead to choose between forward vertical integration or sale to dealers free of any condition on the locations from which they resell to consumers, then major objectives of the Sherman Act—effective competition and consumer welfare—would be damaged, not enhanced.

A. A Manufacturer May Be Expected To Choose the Method of Distribution That Is Competitively Most Effective and Most Satisfies Consumers of Its Product.

Proper antitrust analysis of vertical marketing arrangements must begin with, and never lose sight of, the fundamental identity of manufacturer and consumer interests vis-à-vis intermediate links in the distribution chain.[1] Both manufacturer and consumer want com-

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[1] *See, e.g.*, Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 283, 287-88 (1975); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 Yale L.J. 373, 403 (1966); *cf.* Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 Harv. L. Rev. 1720, 1731-32, 1737 (1974).

The cited authors further argue that the identity of manufacturer and consumer interests extends to manufacturer-initiated

petitively effective, low-cost distribution; neither wants the intermediaries to receive monopoly profits or to incur unnecessary costs.

It is obvious that every manufacturer has a vital economic interest in finding the most efficient, most competitively effective way to distribute its product—that is, one that minimizes distribution costs. It should be equally obvious—but is sometimes forgotten—that the consumer wants the same thing. He, too, wants to be able to buy the product at a convenient location, with necessary information about the product provided before and at the time of sale and with reliable, convenient service, repair parts, and operating information provided after the sale—all at the lowest possible price. Monopoly conditions at any point in the distribution chain (wholesaler or retailer) benefit neither manufacturer nor consumer. Such conditions can only mean higher prices or inferior and less convenient services to the consumer and lower sales and profits for the manufacturer.[2]

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minimum resale price maintenance. The proposition is dubious, and such price-fixing is readily distinguishable from other distribution restraints, particularly limitations on the number of dealers. Among other things, minimum resale price maintenance is plainly against the interests of customers of all those outlets who would carry the product, and at a lower price, absent the restrai' Moreover, unlike limitations on the number of dealers or even territorial restrictions, minimum resale price maintenance cannot serve the purpose of promoting economies of scale in distribution; indeed, it promotes sales of low-volume, high-markup retailers at the expense of more efficient competitors. Accordingly, this Court need have no concern that upholding location clauses would in any way impair the validity of the *per se* rule against minimum resale price maintenance, and we explicitly disavow any such position in this brief.

[2] The manufacturer's dislike of monopoly conditions at the dealer (or wholesaler) level exists regardless of his own degree of market power. "The difference between the price at which the manufacturer sells to the dealer and the dealer's price to the consumer is the manufacturer's cost of distribution, and any seller (even a monopolist) wants to minimize his costs." Posner, *supra* note 1, at 283. For further discussion of this point, *see* p. 46 *infra*.

For these reasons, the manufacturer may normally be expected to benefit from the maximum feasible competition among its dealers, because that increases the sales of the manufacturer's product and prevents excessive dealer margins, thus enabling the manufacturer to compete more effectively with other manufacturers of the same product. Any presumption that a manufacturer would try to suppress intrabrand competition that actually brings about more efficient and effective distribution requires acceptance of the general proposition that manufacturers deliberately foster dealer monopolies at the expense of reduced sales and profits for themselves. That proposition has no logical or empirical basis and should not be the starting point for analysis of the legality of manufacturer-imposed conditions on the location from which the dealer sells the product to the ultimate consumer.

Why, then, do manufacturers sometimes decide to impose conditions on how their dealers sell their products to consumers? Many manufacturers do in fact choose to distribute their products through sales to a limited number of dealers (rather than to anyone willing to pay the manufacturer's price); and they also specify the locations at which the dealers may sell (rather than let them do business from whatever location they wish). The reason for their choice is that they have found such "franchising" systems to be the most efficient, most competitively effective way to distribute their products. Business experience with franchising, especially in the marketing of complex, expensive, long-lasting consumer products such as motor vehicles, demonstrates the advantages that may accrue to manufacturer and consumer alike from a system in which the manufacturer imposes certain responsibilities on dealers in their marketing and servicing activities. Moreover, a growing body of modern

economic thinking about vertical relationships [3] explains why these advantages exist and describes how barring a manufacturer's influence on the locations from which dealers sell its products would threaten consumer welfare.[4]

B. For Complex, Expensive Products Requiring Sophisticated Pre- and Post-Sale Servicing, Effective Competition May Be Best Promoted, and Consumers May Be Best Served, by a Limited Number of Dealers at Specified Locations.

1. *Distribution of Motor Vehicles Through Selected Dealers at Specified Locations Promotes Competition and Benefits Consumers.*

Distribution through franchised dealers has long been established in the motor vehicle industry. The largest and smallest manufacturers, both domestic and foreign, of most types of vehicles have each made the same independent competitive decision: they each choose to distribute their products through carefully selected dealers who do business at locations specified by the manufacturer.[5] The reasons derive largely from the nature of

[3] *See* Phillips, *Schwinn Rules and the "New Economics" of Vertical Relations*, 44 Antitrust L.J. 573, 574 (1975).

[4] We refer here, of course, to vertical marketing conditions that originate with the manufacturer and serve his interest in effective distribution. Conditions that are vertical in form may, on closer examination, occasionally turn out to be the result of a horizontal cartel among dealers, imposed on the manufacturer. As Mr. Justice Brennan pointed out, concurring in *White Motor Co.* v. *United States*, 372 U.S. 253, 267 (1963), such restraints should be treated as horizontal market divisions. *See* pp. 45-46 *infra*.

[5] Some bus manufacturers sell directly to users. The National Automobile Dealers Association, an independent organization comprised of dealers selling all makes of cars and trucks, estimates that as of year-end 1975 there were a total of 29,300 franchised new car dealers. NADA further estimates that of this 29,300, 18,900 handled domestic makes only, 5,600 handled both domestic and imported makes, and 4,800 handled imported makes only. NADA, *Franchised New Car & Truck Dealer Facts* 10 (1976 ed.).

cars and trucks as complex, costly, mobile products, which require large capital investment at the retail level, sophisticated pre- and post-sale servicing, and a continuous flow of accurate information to the consumer on how to operate and maintain his vehicle and on what the vehicle can and cannot be expected to do. A motor vehicle manufacturer whose distribution system fails to meet these requirements cannot succeed in the marketplace.

A motor vehicle purchaser requires much more than mere delivery of the machine itself. Before he buys, as he makes his purchasing decision among competing makes and models, he requires accurate information about the operating characteristics and service requirements of the available vehicles and the available optional equipment. The vehicle itself requires substantial preparation for use after its shipment from the factory.[6] The buyer knows that, after the sale, his vehicle will need regular, and maybe emergency, servicing by the dealer from whom he bought it or by another dealer at any place to which the buyer and vehicle might travel.

The vehicle's service requirements are not simply a matter of customer discretion and choice; they also di-

[6] For example, Paragraph 4(a) of the Standard Provisions of the Ford Sales and Services Agreement provides:

> "Predelivery Service. The Dealer shall perform or be responsible for the performance of such inspection, conditioning and repair of each VEHICLE before delivery as may be prescribed for such VEHICLE in the Company's applicable predelivery inspection and conditioning schedules furnished by the Company to the Dealer. The Dealer shall maintain or be responsible for the maintenance of adequate records of all predelivery inspection, conditioning and repair work performed by or for the Dealer."

Compare the concern of Schwinn that its bicycles be safely and properly assembled before placed in the consumer's hands (rather than being sold "in a carton"). *United States* v. *Arnold, Schwinn & Co.*, 237 F. Supp. 323, 337-38 (N.D. Ill. 1965), *rev'd on other grounds*, 388 U.S. 365 (1967).

rectly involve the manufacturer because of warranty representations and laws and because of the manufacturer's legal responsibilities with respect to safety and emission controls. Vehicle manufacturers are subject to an expensive and expanding range of legal obligations, not only to the dealers who are their immediate vendees, but also to the consumer (and even the consumer's family and guests) with whom they have no contractual relationship. Vehicle manufacturers are required to meet safety standards, to advise vehicle operators if safety defects are found at any time after sale, and to take corrective recall and repair measures at their own expense.[7] They have similar duties with respect to emission controls.[8] Makers of television sets and other electronic products have similar responsibilities for radiation control.[9] All makers of consumer products have safety responsibilities under the Consumer Product Safety Act [10] and obligations with respect to warranty representations under the Consumer Product Warranties Act.[11] Under these laws, all such manufacturers continue to bear very substantial economic risks of loss throughout the entire period that their products are used by consumers.[12]

Since most manufacturers do not sell directly to consumers, they must delegate part of the tasks of maintaining consumer goodwill and of meeting the legal duties they owe consumers to the dealers who deal with consumers directly. They must be able to ensure that the

[7] *See* 15 U.S.C. § 1391 *et seq.* (National Traffic and Motor Vehicle Safety Act).

[8] *See* 42 U.S.C. § 1857 *et seq.* (Clean Air Act).

[9] *See* 42 U.S.C. § 263b *et seq.* (Radiation Control for Health and Safety Act).

[10] 15 U.S.C. § 2051 *et seq.*

[11] 15 U.S.C. § 2301 *et seq.*

[12] *See also* Part III-C *infra*.

dealers will do their part in performing these tasks, and that they will be suitably located and equipped to discharge this function. Vehicle manufacturers achieve this by establishing a network of carefully selected dealers at specified locations.

The manufacturer tries to choose and support competent dealers of efficient size, on whom consumers can safely rely and whose businesses will be stable enough to allow a continuous relationship with the customer. By prescribing the location of each dealer's facilities, the manufacturer can ensure that they are convenient to buyers and can achieve sufficient geographical coverage to reassure buyers that they will find adequate service and repair parts when they travel.[13]

To achieve these benefits, the manufacturer, the individual dealers, and the consumer all put a heavy stake in the dealership system. The manufacturer must help to train the dealer's sales and service personnel, especially with respect to product innovations that continually create new information, training, and service requirements, and also in some cases provide needed capital.[14] The dealers

[13] Competent dealers, expert in selling and servicing the manufacturer's products, also provide a continuous source of reliable information to the manufacturer about consumer needs, service problems, and defects in the product. The manufacturer can act on that information by making competitive product improvements. *Cf. Robertson Rock Bit Co.* v. *Hughes Tool Co.*, 176 F.2d 783, 785 (5th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950).

[14] The preamble to the Ford Sales and Service Agreement provides in pertinent part:

> "To assist its dealers in these responsibilities, the Company establishes and periodically updates standards of operation and planning guides based on its experience and current conditions. It also offers sales and service training courses, advice as to facilities, counseling in the various phases of dealership operations and, through other agreements and the activities of its affiliates, assistance in financing, new and used vehicle merchandising, parts and service merchandising, leas-

must make large capital investments in facilities, equipment, and parts and develop the expertise needed for both pre- and post-sale servicing.[15] The consumer relies heavily on the competence of the dealer who sells him this costly and complex piece of machinery and on the likelihood that the dealership will still be there to provide continuing information and service when the vehicle needs warranty work and other servicing.

If these "investments" are to pay off for all concerned, there must be the optimum number of dealers at the optimum locations. If dealers are too few in number or too widely spaced, the results will be lost sales and the unavailability of adequate service. If they are too many in number or too closely spaced, the results will be inadequate sales potentials, skimping on point-of-sale services, and a cycle of dealer failures and changing locations. This will increase consumer costs, harm consumer confidence in the continuous availability of quality service, and reduce the manufacturer's ability to compete in satisfying consumer expectations.

These benefits of locational franchising in the motor vehicle industry are widely recognized. When new manufacturers—for example, those from abroad—have entered the American motor vehicle marketplace, they have invariably chosen to establish a network of franchised

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ing, daily rentals and facilities development. It also conducts national advertising, promotional and other marketing programs and assists dealers in developing complementary group and individual programs."

[15] For example, each of the 33 Ford dealers serving the San Francisco metropolitan area has an average operating investment of $550,000 (excluding facility costs in the range of $1.0-$1.5 million per dealer) and an average investment of over $100,000 in replacement parts alone. Each employs an average of 23 trained technicians and other personnel for servicing and repairing new and used vehicles. As of October, 1976, the total investment in facilities occupied by Ford and Lincoln-Mercury dealers throughout the United States was approximately $2.4 billion.

dealers at approved locations. The conduct of these newer entrants thus confirms the experience of the established manufacturers, which tried virtually every means of distribution over the years but concluded that distribution through franchised independent dealers at approved locations was competitively the most effective method.[16]

Even critics of the motor vehicle industry concede the many benefits of the dealer franchising system. For example, one of the commentators on whose articles the dissenters below relied [17] stressed that wholly unrestricted distribution of complex products such as automobiles and trucks would render the manufacturer competitively ineffective and produce results harmful to the consumer:

> "If the manufacturers responded to every order of an individual who is willing to pay cash for an automobile, *the distribution process would become a horrible mess.* The administration of such a system would be unduly costly. Delivery costs would be inflated. Moreover, the companies would have to perform the dealers' duty of car preparation at the factory. Large amounts of money would be necessary to stock the cars, whether near the factories or in several wholesale outlets. A network of strategically located retailers alleviates all these burdens." [18]

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[16] "Almost every variety of marketing device was tried. Practically every company sold some cars directly to the consumer. Many sold by mail order and some through large department stores. Some sold on consignment, others on credit or cash in advance." Ford Motor Company, *Evolution of the Ford Franchise Distribution System* 3 (October 1973). Copies of this publication are being lodged with the Court for its convenience.

[17] *See* 537 F.2d 980, 1025, 1028-29 (9th Cir. 1976) (Browning, J., dissenting).

[18] Schmitt, *Antitrust and Distribution Problems in Tight Oligopolies—A Case Study of the Automobile Industry*, 24 Hastings L.J. 849, 874 (1973) (emphasis added). *See also id.* at 876, 898.

The same commentator further conceded that servicing and replacement parts can be provided more efficiently and more cheaply by "a limited number of selected dealers." [19]

The commentators who have criticized locational franchising largely evidence two misconceptions. First, they make unwarranted assumptions about the supposed evils of "product differentiation" [20] and about possible relationships between product differentiation and franchising.[21] Second, and of more analytical importance, these

[19] "The public received a reasonably reliable means of transportation only after there were outlets for replacement parts and persons trained in repair. Moreover, as manufacturers guaranteed free repair work immediately after purchase, this warranty had to be fulfilled by trained mechanics. *The distribution of cars and parts would have proven less efficient and more costly if the manufacturers had not concentrated these tasks in the hands of a limited number of selected dealers.*" Schmitt, *supra* note 18, at 878 (emphasis added).

[20] "Product differentiation" is action by a firm to differentiate its goods and services from those offered by its competitors. *See* F. Scherer, *Industrial Market Structure and Economic Performance* 324 (1971).

[21] *See* Schmitt, *supra* note 18, at 876-81; Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 Harv. L. Rev. 1419, 1423-27 (1968).

These commentators err in regarding all "product differentiation" as socially undesirable. Where products are in fact different, a manufacturer helps the consumer by pointing out the different features of its product and providing, with the "brand" label, a convenient means of assuring the consumer that the product has the features that interest him. When manufacturers stress the ways in which their products are "better," they are thus serving an important consumer information function, as well as promoting their own products. Moreover, the fact of product variety itself benefits consumers. The greater the variety of available products, the greater the likelihood that each consumer will get what he wants. *See, e.g.*, F. Scherer, *supra* note 20, at 324-25; Chamberlin, *Product Heterogeneity and Public Policy*, Am. Econ. Rev. 85-92 (May 1950).

Moreover, even assuming that manufacturers might wish to create "artificial" product differentiation by noninformational promotion of products that have no real differences, there is nothing to suggest that this is a purpose or effect of limiting the number of dealers or specifying their locations. Manufacturers can promote their products directly or give dealers allowances usable only for that purpose; there is no need to limit the number of dealers or specify their outlets. Household bleach, it may be noted, is not distributed through franchised dealers. *Cf. FTC* v. *Procter & Gamble Co. (Clorox)*, 386 U.S. 568 (1967).

Finally, to the extent that dealer organizations are relied on by manufacturers to promote their products, it must be because no other means of promotion is as efficient. If locational franchising were outlawed, promotion would not cease but would simply be carried out by less efficient, more costly methods—a result benefiting no one.

commentators show an inadequate understanding of the practical economic reasons why distribution through franchised dealers selling from specified locations may be the most efficient and effective way for a particular manufacturer to compete.

2. *Market Conditions May Require Manufacturers to Franchise by Location in Order To Be Efficient and Competitively Effective.*

As indicated above, it cannot be suggested that motor vehicle users would be better off if manufacturers were to deliver their products to any retailer with the necessary cash and then stop worrying about what happened next. That may be the best way to distribute magazines or chewing gum, but it would be a competitively disastrous way for a manufacturer to try to meet consumer needs for motor vehicles.

Petitioners concede that a manufacturer should be free to sell to only a limited number of dealers in any one area, or even exclusively to only one. Yet they claim the manufacturer should not be permitted to ensure that these dealers, once selected, will operate from efficiently spaced locations, contending that unrestricted entry by franchised dealers is best calculated to produce the set of dealer locations most conducive to the

competitive effectiveness of the manufacturer and the welfare of the consumer. Petitioners' position is internally inconsistent, contrary to sound competitive economic principles long recognized by antitrust courts, and belied by the actual business experience of competitors in the motor vehicle industry.

To concede that a manufacturer, in the interest of efficient distribution, may limit the number of dealers to whom he will sell is to recognize that in the real world unrestricted dealer entry may neither be procompetitive nor best serve the interests of consumers. Yet a location clause is the minimum restraint necessary to make the manufacturer's limitation on the number of dealers stick. It is, in short, a reasonable ancillary restraint, well within the category of restraints—such as covenants not to compete in the sale of a business, or provisions limiting a joint venture company's competition with its parents—that have long been upheld as reasonably ancillary to transactions and activities that promote rather than restrain competition and trade.[22]

The ways in which limitations on the number of dealers, and location clauses ancillary thereto, may serve to promote efficient distribution and hence consumer interests are well illustrated by the distributional needs of the automotive industry.

a. *The "free-ride" phenomenon, which is detrimental to consumer and manufacturer alike, can be prevented only by means of locational restrictions.*

In order to determine which of several competing products most suits his needs, the consumer must have information about the available products, their similarities and differences, and their comparative suitability to his purposes. With a product like a toothbrush, which is simple, cheap and is purchased often, trial and error can provide the experience necessary to enable the consumer to make an informed choice among types and brands. The "point-of-sale services" required are thus minimal.

But a product like an automobile, a truck, or a color television set may be sufficiently complex to prevent the buyer from determining by mere observation exactly how it will function. It may be purchased so infrequently (and at such cost) that trial and error is an unacceptable basis for evaluation. In this situation, the buyer needs considerable pre-sale services before he can make an informed choice. Some of these services, such as general information about the merchandise, can be provided in written or other form by the manufacturer. But much of the necessary information must be imparted at the point of sale by the dealer. The buyer of a truck, for example, needs painstaking individual attention to choose the combination of optional components that will best assure that his particular needs are met.[23] And a typical automobile buyer personally examines many available models in dealers' showrooms, discusses a variety of optional equipment with dealer personnel, and may also test-drive the authorized dealer's cars prior to any purchase. The dealer also performs certain post-sale services, such as periodic check-ups, for which he is

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[22] *See* Judge Taft's classic exposition of the ancillary restraint doctrine in *United States* v. *Addyston Pipe and Steel Co.*, 85 F. 271, 280-81 (1898).

[23] The business of selling trucks involves extensive discussion and counseling between sales persons and the prospective purchaser. In order to enable the customer to haul the maximum payload of his contemplated cargo at the lowest operating cost per mile, the dealer's technical personnel must determine the appropriate engine size and the proper combination of transmission, clutch, and driveshaft. In addition, particular loading and unloading requirements must be provided for, and the truck must be made to conform with the weight, length, and safety laws that will govern the customer's operations.

not separately compensated by either the consumer or the manufacturer.

A distributional system that did not provide such point-of-sale services would require the consumer to buy expensive items without adequate information and thus impede him from obtaining the product best suited to his needs, undoubtedly to the detriment of the consumer's welfare and the manufacturer's competitive effectiveness. Product distribution free of manufacturer influence would, however, lead to just such a result. Each dealer would recognize that if he incurred the expense of providing the necessary point-of-sale services, and raised the price of his product accordingly, another dealer selling the same brand could forego the services and undercut his prices. Consumers then could take advantage of all the services offered by the first dealer and buy from the second at the lower price.[24] Rather than suffer the competitive disadvantages of such a "free ride" by other dealers, each dealer would opt to provide minimal services and thereby enable himself to meet his competitors' prices.[25]

Manufacturer specification of dealer selling locations is a reasonable and minimally restrictive way to overcome this market dysfunction. By establishing reasonably spaced dealer selling locations, the manufacturer assures each dealer a group of potential customers to whom he is the nearest and most convenient seller and eliminates the possibility that other dealers will set up nearby unauthorized locations—unequipped to provide adequate pre- and post-sale services—and take a "free ride" on his services. Each dealer thus obtains an incentive to provide point-of-sale services to maximize his sales within his area of competitive advantage. But the freedom of every dealer—including some with an approved location quite close by—to sell to any customer, wherever located, preserves the maximum degree of interdealer and intrabrand competition consistent with the competitive effectiveness of the manufacturer and the welfare of the consumer.[26] As shown in Part II-A below, location

[24] *See* Posner, *supra* note 1, at 285.

[25] This is a classic "prisoner's dilemma" situation. *See, e.g.*, P. Samuelson, *Economics* 506-07 (10th ed. 1976). Each dealer's benefit is higher if all provide the necessary point-of-sale services than if none does, because the better-informed consumers are more likely to be pleased with the products they buy and therefore more likely to buy again. But each dealer can achieve an even higher benefit if he avoids providing those services while others provide them, allowing him to take a "free ride." Any dealer who provides the services when another does not receives the lowest benefit: He may be forced to sell at prices that do not cover his costs. Under these circumstances, each dealer rationally pursuing his own interest will choose *not* to provide any services—to the serious disadvantage of the manufacturer and the consumers to whom it is trying to market its products.

[26] The record in this Court in *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), affords ample illustration. In the Los Angeles metropolitan area there were 85 Chevrolet dealers selling throughout the area and beyond. Record 1233. There was an average of five other Chevrolet dealers within five miles of each of the 85 dealer locations. Record 1377. The dealers in Orange County (part of which was in the Los Angeles metropolitan area, Record 607) in the year 1960 made 3753 of their 6157 sales (or 61%) outside the city where located and even sold a high percentage of cars (16%) outside Orange County in 24 other counties of California. Attachment 1, Stipulation No. 5, filed May 20, 1974 (District Court Record). Indeed, under the Chevrolet selling agreement each of the 85 dealers' areas of sale responsibility was the entire Los Angeles metropolitan area (Record 12), and hence each dealer was obligated to promote sales to customers near other dealers' locations as well as near his own.

As another example, Paragraph 2(a) of the Standard Provisions of the Ford Sales and Service Agreements states explicitly that "the Dealer shall not be limited to the DEALER'S LOCALITY in making sales." Publicly available registration records show that a typical Ford dealer in a metropolitan area experiences only about 37% of his total sales in the immediate area around his location. He experiences 77.3% of his total sales in this same area plus those areas immediately adjacent to the respective locations of other Ford dealers which encircle him. The remaining 22.7%

clauses thus are much less restrictive than the closed selling territories involved in *Schwinn* and are consistent with vigorous intrabrand competition.[27]

b. *Dealers' incentives to open additional selling locations may conflict with the long-term interests of manufacturer and consumer.*

Manufacturers seek to maximize the amount of merchandise they can sell, while providing satisfactory services for the consumer to protect their long-term goodwill. If demand in an area increases to the point that another dealer location can profitably be opened, the manufacturer will—as a matter of its own self-interest—authorize such a location for a new or existing dealer. In the motor vehicle industry, for example, manufacturers decide the number of dealers and their locations on the basis of comprehensive studies and analyses of

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of the sales of such dealer fall elsewhere in essentially unpredictable patterns, some within other parts of the metropolitan area and some beyond.

[27] Three other methods of achieving this result can be imagined. None of them is nearly so satisfactory as the dealer location clause. One would be to allow dealers to agree among themselves about the level of point-of-sale services each will provide. But the dealers would not share the manufacturer's incentive to minimize distribution costs, and their agreements would be subject to anticompetitive abuse. *See* Posner, *supra* note 1, at 287, 298-99. Compare *United States* v. *Sealy*, 388 U.S. 350 (1967). A second method would be to sell the point-of-sale services as a separate product, thus allowing equal price competition for the product itself. *See* Comanor, *supra* note 21, at 1433. It is simply inconceivable, however, that an automobile dealer, for example, could ever sell admission to his showroom or the time of his salesmen, or charge for test-drives, without suffering more from the negative reactions of consumers than the provision of those services would be worth. Finally, manufacturers could require in the franchise contract that dealers offer full point-of-sale services at all locations, but the economic pressure on the local dealer to take advantage of "free-ride" possibilities would be so great that an extensive, costly policing system would have to be developed by the manufacturer. Moreover, proliferating locations would produce wasteful duplication of facilities. Locational restrictions, whose violations are much more easily detected, minimize these problems.

sales potential.[28] Each manufacturer periodically reviews its dealerships and reconsiders how many dealer locations it should have in an area and where they should be sited. The aim is to provide a dealer location for every neighborhood that can support one and not to put two locations in a neighborhood which can support only one. In this way the manufacturer seeks the continuous, competitively effective long-term presence of full-service dealers in as many communities as practicable throughout the country.

Dealers, however, look at the issue of opening additional locations from a different perspective. They are normally and properly concerned with their own ability to make a profit, generally over a shorter term than the manufacturer looks to, and with only their own costs considered. For some simple products like toothpaste, the decisions of retailers might be expected to yield results favorable to all concerned. But in the distribution of complex products such as motor vehicles, decisions based on the interests of each individual dealer alone, free of manufacturer influence, could seriously harm the interests of the consumer as well as the manufacturer.

A car or truck buyer knows that his purchase will last many years, and he relies heavily on the expectation that a dealership will be there to stand behind the vehicle if it proves defective and to provide quality service when needed. The consumer has a similar interest in the continuous availability of competent servicing establish-

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[28] Manufacturers project the sales potential of each area from motor vehicle registration data in public records. They also make extensive field studies. *See* Affidavit of Rudolph F. Schreitmueller, reprinted at pages 202-18 of the appendix in this Court in *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). Mr. Schreitmueller's affidavit and other materials in the appendix in that case describe the development and benefits of General Motors' franchising system, which is typical of the industry generally.

ments in communities throughout the country should he move or travel. The consumer's interest in local and nationwide service availability is not shared by a dealer who can reap short-run profits from a new selling location even if, because of failure of the franchised servicing dealer, consumers later turn to other brands. But the consumer's interest is shared by the manufacturer, whose long-term sales and competitive position will depend on the consumer's expectations of service continuity being satisfied.[29]

The costs to the manufacturer of continuous entry and exit at the dealer level are substantial as well. New franchised dealers in the automobile industry require a heavy investment by the manufacturer. The dealer's personnel must be trained to perform all of the services expected by the consumer—pre-sale preparation, marketing, and post-sale maintenance and repair. If excessive opening of unfranchised new locations causes unnecessary turnover or lowering of service quality among franchised dealers, this manufacturer investment is wasted and the total cost of distribution increased. The dealer franchised for one location who opens an additional unfranchised location has no reason to consider that loss, but the manufacturer does.[30] Since the interests of the

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[29] In economic terms, this consumer interest is "external" to the dealer's decisionmaking but "internal" to that of the manufacturer. Decisions that do not take account of such "externalities" cannot be expected to produce the most socially desirable results. *See generally* P. Samuelson, *supra* note 25, at 476-78. For an analysis of why the consumer does not or cannot correct this type of market misallocation, *see* Schelling, *On the Ecology of Micromotives*, 25 The Public Interest 61 (1971).

[30] The district court in *Schwinn* found that the manufacturer there had adopted locational franchising of retailers to protect its similar investment in its relationships with dealers. Many of Schwinn's costs in dealing with its retailers varied with the number of retailers, not with the volume of their sales. *See United States* v. *Arnold, Schwinn & Co.*, 237 F. Supp. 323, 337-38 (N.D. Ill.

dealer who opens an additional unfranchised location coincide less with the interests of consumers than do the interests of manufacturers, consumer welfare will benefit if the manufacturers specify the locations.

3. *This Court Should Not Fashion Antitrust Rules That Would Compel Manufacturers to Choose Distribution Systems Less Beneficial to the Consumer.*

If this Court were to condemn location clauses, and the franchising systems built on them, as *per se* illegal, consumers would almost certainly be harmed. Manufacturers that now use locational franchising would be forced to choose between wholly unrestricted distribution and forward vertical integration. If they chose the former, the inefficiencies outlined above would be endemic—to the detriment of both manufacturers and consumers. If the manufacturers tried to avoid those problems through vertical integration, as Schwinn did after this Court condemned its restrictions on distributors,[31] consumer welfare could also suffer.

Vertical integration, though it may achieve economies comparable to those of franchising, may also create offsetting diseconomies that make it, if forced on a manufacturer against its better business judgment, less beneficial for both manufacturers and consumers. Integration transforms the independent local retailer into the

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1965), *rev'd on other grounds*, 388 U.S. 365 (1967). This Court on appeal did not disturb those findings or disapprove Schwinn's locational franchising of retailers. *See* Part II *infra*.

[31] *See* L. Rubin, The Theory of Franchising (1973) (unpublished Ph.D. thesis in Univ. of Pa. Library) at 181. ABA Antitrust Section, *Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition* 49 (forthcoming 1977) (final manuscript as approved for publication). For the convenience of the Court, manuscript copies of this forthcoming publication are being lodged with the Court.

employee of a large, integrated firm. The retail outlet may thus lose the ability of an independent franchisee to respond to changes in local conditions. To the extent that control is centralized, control costs and complex managerial requirements may arise that counterbalance the benefits of integration. To the extent that there is an interest in having opportunities for independent entrepreneurship in distribution, that interest is obviously not served by forcing manufacturers to integrate where they would not otherwise do so.

None of this is to say that existing locational franchising systems are perfect, in the motor vehicle industry or elsewhere. Those systems have evolved over many years in response to the inadequacies of other methods of distribution, and they will keep evolving in response to new consumer demands and changing economic conditions. But there is no reason to believe that improvement will come from a judicially imposed *per se* rule that forbids the manufacturer to control its dealers' locations, no matter how sound his competitive reasons for doing so, and no matter how closely they coincide with the consumer's interests. Since the manufacturer has no reason to exercise that control to its own detriment or the consumer's, it can be expected to respond to any consumer pressure for change in existing systems. Moreover, the "new economics of vertical relations" is increasingly illuminating the economies that can be achieved by manufacturer influence on dealer practices.[32] Further evolution of practice and theory in this area should not be strait-jacketed by a rigid *per se* rule.

[32] Phillips, *supra* note 3, at 574.

II. LOCATION CLAUSES ARE LAWFUL BECAUSE THEY ARE NECESSARY AND REASONABLY ANCILLARY TO DISTRIBUTION THROUGH SELECTED, FRANCHISED DEALERS.

Where the most efficient and competitively effective way to distribute a complex consumer product is through selected independent dealers, location clauses are reasonable, ancillary conditions necessary to make the selective distribution system work. Petitioners herein, and the dissenters below, acknowledge that "franchising by location" is a method of distribution that has been consistently upheld by the courts under the rule of reason, both before and after *Schwinn*. A manufacturer cannot, however, effectively implement a system of locational franchising unless it may control the opening of additional or substitute locations by its dealers. The limited, ancillary restraint that a location clause imposes on dealers should not be condemned by an unwarranted extension of the *Schwinn per se* language.

A. The Courts Have Consistently Held That Location Clauses Can Be Justified Under the Rule of Reason.

Both the petitioners and the dissenters below accept the established proposition that a manufacturer may "franchise by location."[33] Their disagreement with the majority stems largely from their misunderstanding of what that practice necessarily entails. We submit that the majority was correct in concluding that "franchising by location" is a meaningless phrase unless the manufacturer is allowed to exercise authority over the opening by a dealer of additional locations not specified in his franchise. Without an enforceable location clause forbidding a dealer to open a new location without the manufacturer's consent, "franchising by location" would

[33] *See* Brief for Petitioners 42-49; 537 F.2d at 1014-17 (Kilkenny, J., dissenting).

exist, if at all, only at the election of individual dealers. The lower courts have understood this simple fact and have accordingly upheld location clauses as reasonable conditions on how a dealer sells.

The reasonableness of location clauses was established, long before *Schwinn*, in the leading case of *Boro Hall Corp.* v. *General Motors Corp.*, 124 F.2d 822 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943). In an opinion by Judge Augustus Hand, the Second Circuit there held that a contractual clause fixing "a location for the sale of used cars at a place that did not unduly affect other dealers" did not constitute an unreasonable restraint of trade. *Id.* at 823.

The rule of *Boro Hall* has prevailed without contrary authority for many years. In 1966, ten months before *Schwinn*, this Court found it unnecessary to rule on the lawfulness of location clauses in *United States* v. *General Motors Corp.*, 384 U.S. 127, 139-40 (1966).[34] On remand in that case, the district court expressly decreed, without objection by the United States, that General Motors was free unilaterally to enforce its location clauses.[35]

Schwinn did not touch the validity of location clauses. Although Schwinn's distribution program included location clauses specifying the locations from which retailers could sell,[36] the validity of those clauses was not ques-

[34] *See also id.* at 149 (Harlan, J., concurring) ("In my opinion, . . . General Motors is not precluded from enforcing the location clause by unilateral action, and I find nothing in the Court's opinion to the contrary.")

[35] *United States* v. *General Motors Corp.*, Civ. No. 62-1208-CC (S.D. Cal. Aug. 17, 1966) (unreported), *quoted in* the opinion below, 537 F.2d at 993-94.

[36] *See United States* v. *Arnold, Schwinn & Co.*, 237 F. Supp. 323, 325 (N.D. Ill. 1965), *rev'd on other grounds*, 388 U.S. 365 (1967); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 370 (1967).

tioned by the district court or attacked by the Government on appeal.[37] The issues which the Government brought to this Court related to (1) Schwinn's arrangements for "territorial exclusivity" among wholesalers, and (2) its restrictions on the classes of customers to whom both wholesalers and retailers could sell. 388 U.S. at 371-74 & n.5, 376-77. Schwinn gave each wholesaler a specified territory (in many cases exclusive of any other wholesaler) and forbade it to sell to retailers located outside that territory.[38] Schwinn also specified the categories of customers to whom a wholesaler could sell (only to franchised retailers) and to whom a retailer could sell (to any consumer, but not to another retailer or a discount house). As explained in Part III below, the Court upheld these restrictions under the rule of reason as they related to bicycles sold on a consignment or agency basis but declared them invalid *per se* as they related to bicycles sold to wholesalers or retailers for resale.[39] The validity of Schwinn's location clauses for retailers was not before this Court and was not decided by it.[40]

[37] *See United States* v. *Arnold, Schwinn & Co.*, 237 F. Supp. 323 (N.D. Ill. 1965), *rev'd on other grounds*, 388 U.S. 365 (1967); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 370-71, 376-77 (1967).

[38] *See also White Motor Co.* v. *United States*, 372 U.S. 253, 255-56 (1963) ("typical" territorial clause obligated wholesaler "not to sell such trucks except to individuals, firms, and corporations having place of business and/or purchasing headquarters in said territory").

[39] As to the invalidity of the post-sale territorial restrictions, the Court's statement was *dictum*. See note 61 *infra*.

[40] Petitioners quote (at 34) this Court's statement that, "The principle [condemning restrictions on the classes of customers to whom a wholesaler who owns the goods may resell] is, of course, equally applicable to retailers, and the decree should similarly enjoin the making of any sales to retailers upon any condition, agreement or understanding limiting the retailer's freedom as to where and to whom it will resell the products." 388 U.S. at 378. That

Location clauses are obviously less restrictive than the territorial restrictions involved in *Schwinn*. Petitioners' attempt to equate the two is unavailing. They argue that there is a mere difference in "form" between a manufacturer's dividing a city into two exclusive territories, which it assigns to two different dealers, and its assigning locations to the dealers in different parts of the city.[41] But exclusive territories wall out all competition among dealers—none is allowed to sell to customers residing outside his territory. Location clauses merely specify the locations from which the dealers may sell. They remain free to—and do—sell to any customer, regardless of the customer's home or place of business.[42] A dealer with a "location east of 12th Street" [43] may sell to customers anywhere in the city and beyond.

Every lower court that has considered the question has agreed that *Schwinn* did not strike down location clauses, whether in consignment or sale transactions. Indeed, the final decree on remand in the *Schwinn* case itself expressly sanctions such clauses.[44] And location

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sentence appears in a passage that discusses Schwinn's customer restrictions, requiring wholesalers to sell only to franchised retailers and such retailers to sell only to consumers. Nowhere in the passage does the Court mention the location clauses for retailers, which were not before it, or purport to address the issue left open in *United States* v. *General Motors*. The Court's reference to "the retailer's freedom as to where and to whom it will resell" thus should be read to relate only to the issue before the Court concerning the validity of restrictions on the *customers* to whom retailers could sell. *See also id.* at 379.

[41] Brief for Petitioners at 31-35.

[42] *See also* note 26 *supra*.

[43] Brief for Petitioners at 32.

[44] The decree contains general language tracking this Court's opinion, followed by this proviso: "Notwithstanding the foregoing provision, nothing in this Final Judgment shall prevent Schwinn . . . from designating in its retailer franchise agreements the location of the place or places of business for which the franchise is issued." *United States* v. *Arnold, Schwinn & Co.*, 291 F. Supp. 564, 565-66 (N.D. Ill. 1968).

clauses have been expressly upheld in four cases since *Schwinn*, including the *en banc* decision below. *See Salco Corp.* v. *General Motors Corp.*, 517 F.2d 567 (10th Cir. 1975); *Kaiser* v. *General Motors Corp.*, 396 F. Supp. 33 (E.D. Pa. 1975), *aff'd mem.*, 530 F.2d 964 (3d Cir. 1976); *Sheldon Pontiac* v. *Pontiac Motor Division*, 418 F. Supp. 1024 (D.N.J. 1976).[45] Commentators and the Department of Justice have agreed that location clauses are not *per se* unlawful after *Schwinn* but are to be tested by the rule of reason.[46]

Petitioners do not challenge the authority of these post-*Schwinn* cases, except for the decision below. Rather, petitioners argue that all the cases but this one merely upheld location clauses in the abstract, on records that were "devoid of suggestion that the manufacturer also obtained and enforced promises by dealers that they would not ship merchandise for resale to locations where they were not franchised." [47] But a location clause *is* just

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[45] *See also United States* v. *Revlon, Inc.*, 1975-1 Trade Cas. ¶ 60,202 at 65,727 (S.D.N.Y. 1975) (location clauses said to be *per se* unlawful under *Schwinn*), *modified*, 1975-2 Trade Cas. ¶ 60,583 (S.D.N.Y. 1975) (permits use of location clauses).

[46] *E.g.*, Robinson, *Recent Antitrust Developments: 1974*, 75 Colum. L. Rev. 243, 276 (1975); McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal*, 37 Antitrust J. 137, 144-45 (1968); Pollock, *Alternative Distribution Methods After Schwinn*, 63 Nw. U.L. Rev. 595, 603-04 (1968); *cf.* New York State Bar Association, *1968 Antitrust Law Symposium* 60-65 (1968); A.B.A. Committee on the Clayton Act, *Marketing and Franchising: Antitrust Prognosis for the 70's*, 39 Antitrust L.J. 502, 516 (1970) (Panel discussion).

For the view of a Justice Department spokesman, *see* K. Clearwaters, *Franchising and the Antitrust Laws*, Address Before International Franchise Association, May 16, 1974, *quoted in* Robinson, *supra* at 276 n.207, and in the opinion below, 537 F.2d at 996.

[47] Brief for Petitioners at 46.

such a promise. In *Salco*, the facts developed on the manufacturer's motion for summary judgment showed that the manufacturer had "assert[ed] its rights under the terms of the clause by insisting on the right to approve a new location for Denver Buick." 517 F.2d at 576.[48] Nonetheless, the Tenth Circuit held that "the Section 1 allegations were properly dismissed, since the location clause is valid as a matter of law, and there are no allegations that would amount to an unlawful use of the clause." *Id.* And nothing in any of the other decisions suggests that the courts, in upholding location clauses, thought the clauses could be evaded by the simple device of opening a "non-franchised" location without manufacturer approval.

Common sense itself refutes petitioners' suggestion that, in upholding "the practice of franchising by location," the courts held only that the manufacturer may prohibit a dealer from "holding himself out" as a franchised dealer at locations other than those authorized by the manufacturer.[49] Petitioners' argument is, in effect, that a manufacturer may not control a dealer's opening of new locations but may control only what sign the dealer puts over the door. The court below rightly termed that argument "spurious." [50] The legitimate competitive and pro-consumer purposes of distribution through selected dealers at specified locations, discussed in Part I above, require that the manufacturer be able to control the number and location of the outlets for his product. Those purposes would be wholly frustrated if any dealer were free to establish as many additional locations as he wished, wherever he wished, as long as he refrained from

[48] *Salco* involved a dealer's attempt to change locations rather than to open an additional location, but the principle applicable to the two situations is the same.

[49] Brief for Petitioners at 46-47.

[50] 537 F.2d at 994 n.22.

calling himself an "authorized dealer" at the extra locations.[51] "Franchising by location," if it means anything, must mean that the manufacturer controls the location at which the franchisee will do business in selling and servicing the manufacturer's products. *See* opinion below, 537 F.2d at 994 n.22.[52]

B. The Courts Have Upheld Exclusive Franchises, Which Are More Restrictive Than Location Clauses.

When a manufacturer grants an exclusive franchise, it assigns a dealer a specified location *and* promises the dealer that it will not authorize any competing dealers to sell from locations within a specified surrounding area. *E.g.*, *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957). Such arrangements between a manufacturer and his retailers are an exercise of the former's right to "select his customers, and for this purpose [to] 'franchise' certain dealers to whom, alone, he will sell his goods." *Schwinn*, *supra*, 388 U.S. at 376; *see id.* at 379-80. To keep his promise of exclusivity to one dealer, the manufacturer must impose, and be able to enforce, location restrictions on other dealers he may franchise.

The authorities upholding exclusive franchises, both before and after *Schwinn*, are so overwhelming that even the petitioners do not question them. As the court below noted, the cases amount to a "veritable avalanche of precedent" in favor of the lawfulness of exclusive fran-

[51] Moreover, when the product bears the manufacturer's trademark and is accompanied by the manufacturer's informational brochures and warranties, any location from which it is sold will appear to be an authorized location, and any shortcomings in the manner of sale or accompanying services will harm the manufacturer's goodwill. Also, since the dealer is "authorized" at another location, the consumer cannot be expected to know where he is acting as an "authorized" dealer and where not.

[52] *See also* Pollock, *supra* note 46, at 603-04.

chises. 537 F.2d at 997. But petitioners contend that in upholding exclusive dealerships the courts have engaged in empty formalism. Petitioners would distinguish between the lawfulness of the manufacturer's promise not to franchise other dealers in an area and the lawfulness of the actions necessary for him to keep his promise. They argue that, under *Schwinn*, a manufacturer may not keep other dealers from locating in the area of the exclusive dealership. Such a rule would mean, as the court below said, that, "*if a dealer is franchised anywhere he is franchised everywhere.*" [53] The manufacturer could keep its promise not to franchise other dealers in the first dealer's area only by refraining from franchising any more dealers at all.

Petitioners do not deny that this construction of the *Schwinn per se* rule would effectively destroy exclusive franchises. But they argue that the *Schwinn per se* rule (as they construe it) must "get priority . . . . [O]therwise the rule about exclusives would destroy the *Schwinn per se* rule." [54] Petitioners miss the point of the cases upholding exclusive franchises after *Schwinn*. The *Schwinn per se* rule prohibits a manufacturer from specifying the customers to whom a purchaser may resell the product—either by prescribing classes of customers or by confining the purchaser's marketing to a designated territory. In upholding exclusive franchises after *Schwinn*, the courts have necessarily held that the rule does not condemn restrictions on the location from which the dealer may resell.[55] Under that correct reading of

[53] 537 F.2d at 998 (emphasis in original).

[54] Brief for Petitioners at 44-45.

[55] The courts have also upheld after *Schwinn* other restrictions on the *focus* of dealer activities. A manufacturer may assign to dealers "areas of primary responsibility," within which they are to concentrate their efforts; and it may impose "profit pass-over agreements," under which a dealer who sells in another dealer's

the *Schwinn per se* rule, it does not conflict at all with the cases upholding exclusive franchises and location clauses.[56]

In sum, the lower federal courts have recognized that location clauses and even exclusive franchises are reasonably ancillary to lawful systems of locational franchising. Those arrangements have long been upheld under the rule of reason, and the lower federal courts have overwhelmingly ruled that they are not touched by the *Schwinn per se* rule. Petitioners offer no authority to the contrary, but only an unpersuasive extension of *Schwinn* that would vitiate both the arrangements and the decisions upholding them.

area is required to pay the other dealer a specified percentage of the price received. *See* ABA Antitrust Section, *supra* note 31, at 35-37 and cases cited.

[56] Seeking a way to distinguish the exclusive distributorship cases, petitioners urge that there is less danger to competition in the manufacturer's promise not to franchise other dealers in an area than in the dealer's promise not to expand to other locations. Brief for Petitioners at 43-44. That ignores the fact that exclusive franchises necessarily involve *both* promises. Location clauses, which involve only the dealer's promise *without* a reciprocal promise by the manufacturer, are necessarily less restrictive because the manufacturer preserves its freedom to franchise additional nearby dealers as its competitive interest warrants. *See* Posner, *supra* note 1, at 283, 287, 298-99.

Petitioners also argue that location clauses are unreasonably restrictive because, "[w]ithout the investment and risk of forward integration, the manufacturer appropriates control over one of the most crucial competitive decisions any truly independent trader must make—where he will sell his wares." *Id.* at 43. That argument suggests that the supposed evil of location clauses is the dealers' loss of freedom. But the primary danger posed by any vertical restraint is the possibility that it results from a camouflaged dealer cartel. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 407-08 (1911); *United States* v. *General Motors*, 384 U.S. 127 (1966); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 157-58 (1968) (Harlan, J., dissenting). To suggest that vertical restraints are invalid because they limit dealers' freedom "stands *Dr. Miles* on its head." Posner, *supra* note 1, at 289-90.

III. IF *SCHWINN'S* BROAD *PER SE* LANGUAGE CONFLICTS WITH THESE SOUND ANTITRUST PRINCIPLES, THAT LANGUAGE SHOULD BE RECONSIDERED.

As demonstrated in Part II above, the decision below can be affirmed without reconsideration of the *Schwinn per se* language. However, such an affirmance would leave the law governing vertical restraints on the scope or focus of dealer marketing activities, as enunciated by this Court, in its present unsatisfactory state. The rationale of the *Schwinn per se* rule is, after all, faulty and unpersuasive. Depending as it does solely on a commercial law distinction between sale and nonsale transactions, it requires lower courts to base their decisions on factors unrelated to the economic effects of vertical arrangements or the principles announced in other, better reasoned antitrust precedents. The *Schwinn per se* rule for sales transactions should be recognized as an aberration from the antitrust jurisprudence of vertical marketing restraints and should accordingly be repudiated by the Court.

A. *White Motor* and the *Schwinn* Ruling on Consignment and Agency Arrangements Establish that Vertical Territorial Restrictions Should Be Tested by the Rule of Reason.

In *Schwinn*, the manufacturer distributed its bicycles both by consignment or agency arrangements with wholesalers and by sales to wholesalers and retailers. In dealing with the consignment or agency arrangements, the Court applied a rule-of-reason analysis with careful attention to the economic consequences of the restrictions. That analysis was consistent with other decisions of this Court and should have been applied also to sales transactions.

Four years before *Schwinn*, this Court decided its "first case involving a territorial restriction in a *vertical* arrangement." *White Motor Co.* v. *United States*, 372 U.S. 253, 261 (1963) (emphasis in original). The Court reversed a summary judgment against a manufacturer with respect to the legality of vertical restrictions on territory and customer selection. The Court refused to rule on their validity as a matter of law, saying that "we know too little of the actual impact of both that restriction and the one respecting customers" to pass on their validity without factual proceedings. *Id.* The Court sharply distinguished vertical territorial limitations from horizontal ones, stating:

> "A vertical territorial limitation may or may not have that purpose or effect [to stifle competition]. We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. . . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' . . . and therefore should be classified as *per se* violations of the Sherman Act." [57]

In *Schwinn*, the Court reaffirmed these conclusions. Mr. Justice Fortas' opinion for the five-justice majority noted that:

> "The Government does not contend that a *per se* violation of the Sherman Act is presented by the practices which are involved in this appeal . . . . Accordingly, we are remitted to an appraisal of the market impact of these practices." 388 U.S. at 373.

"Our inquiry," the Court said, "is whether . . . the effect upon competition in the market place is substantially adverse." 388 U.S. at 375. The Court began that inquiry by recognizing the established rule that "a manufacturer of a product other and equivalent brands of

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[57] *Id.* at 263, *quoting Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958). *See also id.* at 264 (Brennan, J., concurring).

which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods." *Id.* at 376. It refused, as in *White Motor*, "to introduce the inflexibility which a *per se* rule might bring if it were applied to prohibit all vertical restrictions of territory and all franchising . . . ," and observed that such a rule "might sharply accelerate the trend towards vertical integration of the distribution process." *Id.* at 379-80. The Court held that the territorial restrictions in Schwinn's consignment arrangements would be unlawful only if their impact was "unreasonably restrictive of competition." *Id.*

Analyzing the district court's findings about the effects of Schwinn's consignment restrictions, the Court found that "the rule of reason is satisfied." It identified four factors as critical to that conclusion:

(1) competitive bicycles were available;

(2) Schwinn dealers were free to handle other brands of bicycles;

(3) the territorial restrictions were not ancillary to a price-fixing scheme; and

(4) the restrictions were justified by competitive pressures and preserved rather than damaged competition. *Id.* at 381-82.

The Court concluded: "Application of the rule of reason here cannot be confined to intrabrand competition. When we look to the product market as a whole, we cannot conclude that Schwinn's franchise system with respect to products as to which it retains ownership and risk constitutes an unreasonable restraint of trade." *Id.* at 382.[58]

[58] The Court reached this conclusion unanimously. Mr. Justice Stewart, joined by Mr. Jusitce Harlan, said, "I completely agree with the Court's basic approach to this case." *Id.* at 387. Those

But when the *Schwinn* majority turned to the identical restrictions in Schwinn's arrangements for sales to wholesalers and retailers, it failed to apply this careful analysis of economic effects. Instead, it asserted without explanation that "the ancient rule against restraints on alienation" compelled a holding that the restrictions were invalid. *Id.* at 380. In so ruling, the Court misconceived the nature and purpose of the common law rule disfavoring "restraints on alienation" and gave no explanation why federal antitrust law should follow that rule in lieu of its traditional attention to economic effects.[59] The Court did not dispute the statement by Mr. Justice Stewart in dissent that vertical restrictions in consignment and sales arrangements "may operate identically in terms of economic function and competitive effect." *Id.* at 393. The *Schwinn* majority did not even refer to the test this Court had established to determine the appropriateness of a *per se* rule—whether the challenged practices have such a "pernicious effect on competition and

Justices dissented from the majority's inconsistent *per se* approach to Schwinn's sales arrangements. *Id.* at 388-94.

[59] As Mr. Justice Stewart said, dissenting, the common law rule did not condemn all restraints on alienation but "concerned itself with arbitrary and severe restrictions on alienation, such as total prohibition of resale." 388 U.S. at 391. The rule apparently would not have been violated by the kind of restriction imposed by Schwinn on its dealers and, in any event, did not exist to promote competition. *See* Posner, *supra* note 1, at 296.

The *Schwinn* majority cited only *White Motor* and *Dr. Miles* to support the relevance of the "ancient rule" to vertical restraints under the Sherman Act. 388 U.S. at 379-80. In *White Motor*, the rule was mentioned only by Mr. Justice Brennan in concurrence, who asserted that the common law rule was *not* a reason to hold territorial restrictions *per se* unlawful unless the test of *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958) was satisfied. 372 U.S. at 365. In *Dr. Miles*, the Court mentioned the fact that resale price maintenance imposed a restraint on alienation primarily to counter Dr. Miles' contention that it had a common law right to establish resale prices. 220 U.S. at 404-05; *see* ABA Antitrust Section, *supra* note 31, at 61 n.125; Posner, *supra* note 1, at 288.

lack of any redeeming virtue" as to make unnecessary any "inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958). Nor could the Court have found that test satisfied, in view of its conclusion that identical restrictions in Schwinn's consignment transactions had pro-competitive effects.

Rather, the majority appears simply to have concluded that the "ancient rule" foreclosed its attaching the same antitrust consequences to consignment and sale restrictions, despite their identical economic effects.[60] The Court's sweeping reference to the "ancient rule against restraints on alienation" (388 U.S. at 380) has thus been read to establish a *per se* rule condemning the restrictions involved in *Schwinn* whenever a manufacturer sells its products for resale to customers.[61]

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[60] The Department of Justice in *Schwinn* urged the Court *not* to distinguish between consignment and sale transactions, stating that there was no relevant difference between their economic effects. Brief for the United States at 54-57, *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

[61] Throughout the opinion, the Court discussed Schwinn's customer restrictions and its territorial restrictions together. However, as the opinion acknowledged, 388 U.S. at 377, and as Chief Justice Burger has pointed out, *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 617 (1972) (dissenting opinion), the issue of post-sale territorial restrictions was not before the Court in *Schwinn*. The Court's discussion of it therefore was *dictum*. The trial court found that the territorial restrictions had resulted from an agreement among the distributors, and it held that the agreement was an unlawful horizontal restraint. *United States* v. *Arnold, Schwinn & Co.*, 237 F. Supp. 323, 342 (N.D. Ill. 1965), *rev'd on other grounds*, 388 U.S. 365 (1967). No appeal was taken from that ruling, *see* 388 U.S. at 368. Strictly speaking, therefore, the only post-sale restrictions before the Court were Schwinn's customer restrictions.

B. *Schwinn's* Creation of a *Per Se* Rule Based on the Distinction Between Consignment and Sale Has Been Criticized by the Courts, Commentators, and Antitrust Enforcement Authorities.

Nearly ten years have passed since *Schwinn* inserted the commercial law distinction between sale and consignment into the antitrust law of vertical restraints on the scope and focus of dealer marketing activities. Experience has confirmed that the distinction bears no relationship whatever to the economic effects of vertical arrangements. Faced with a rule that condemns vertical restrictions on purchasers, while upholding as reasonable and pro-competitive the same restrictions on agents or consignees, the courts, commentators, and antitrust enforcement authorities have roundly criticized the *Schwinn per se* rule and properly sought every available means to limit its application.

As noted in Part II above, the lower federal courts have held that *Schwinn* left intact the established law upholding location clauses, exclusive franchises, and other vertical restrictions not involved in that case. Moreover, even in cases involving territorial restrictions such as those in *Schwinn*, the courts since that decision have struggled to distinguish or limit the *Schwinn per se* rule to avoid the unjustifiable results that would flow from blind adherence to its broad language.

For example, the Third Circuit *en banc* has interpreted the majority's statement in *Schwinn* that it is unreasonable "without more" to impose post-sale restrictions as authorizing an exception to the *per se* rule where a manufacturer proves "more" by showing that the restraints will protect consumers against injury and the manufacturer against product liability claims.[62] The Third Cir-

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[62] *Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932, 936-38 (3d Cir.) (*en banc*), *cert. denied*, 400 U.S. 831 (1970).

cuit has since suggested that the *Schwinn per se* rule may be inapplicable in any case "where a manufacturer's restriction is related to a legitimate business purpose." [63] Many courts have refused to invoke the *Schwinn per se* rule absent proof that the challenged restraints have been "firmly and resolutely" enforced.[64] Other courts have relied on various factual distinctions to justify upholding post-sale territorial restraints that would seem to fall within the language of the *Schwinn per se* rule.[65] Still other courts have enforced the *Schwinn per se* rule in the cases before them, but with suggestions that this Court make exceptions to it or redefine it.[66]

The justifications and distinctions offered by the lower courts in their ongoing struggle with the *Schwinn per se* rule would naturally bear on the validity of vertical restrictions under a rule of reason; but they are of dubious relevance under a strict *per se* approach. One does not

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[63] *Scooper Dooper, Inc.* v. *Kraftco Corp.*, 494 F.2d 840, 847 n.13 (3d Cir. 1974).

[64] *E.g., Janel Sales Corp.* v. *Lanvin Parfums Inc.*, 396 F.2d 398, 406 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968); *Good Investment Promotions, Inc.* v. *Corning Glass Works*, 493 F.2d 891, 893 (6th Cir. 1974); *Colorado Pump & Supply Co.* v. *Febco, Inc.*, 472 F.2d 637, 639 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973). *See generally* Robinson, *supra* note 46, at 273-74.

[65] *Carter Wallace, Inc.* v. *United States*, 449 F.2d 1374, 1379-81 (Ct. Cl. 1971) (*per se* rule inapplicable when a purchaser can avoid the restraints by electing to buy the product at a higher price); *LaFortune* v. *Ebie*, 1972 Trade Cas. ¶ 74,090, at 92,486 (Cal. Dist. Ct. App. 1972) (food industry distinguished from bicycle industry).

[66] *E.g., Adolph Coors Co.* v. *FTC*, 497 F.2d 1178, 1187 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (invited Supreme Court to grant "an exception to the *per se* rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason"); *Eastex Aviation, Inc.* v. *Sperry & Hutchinson Co.*, 522 F.2d 1299, 1306 (5th Cir. 1975). ("Ancient rules of property law should not be made the basis for determining the application of modern rules of antitrust law.")

find federal courts enmeshed in the same kind of rationalizing when they sit in judgment on horizontal price-fixing conspiracies. The courts' invocation of such considerations in cases involving post-sale vertical restraints reflects their unwillingness to reach arbitrary and unjust results solely on the basis of a principle of commercial law unrelated to sound antitrust analysis.

The reaction of legal commentators to the *Schwinn per se* rule has been equally unkind. The doctrine announced by this Court has evoked repeated, trenchant, and nearly unanimous disapproval. The Ninth Circuit's *en banc* opinion in the instant case cites a sampling of the critical commentary.[67] The criticism continues unabated.[68]

Many antitrust enforcement authorities themselves have recognized that vertical territorial restrictions are more appropriately tested under the rule of reason than under a *per se* rule based on the distinction between consignment and sale. Donald I. Baker, now Assistant Attorney General for Antitrust, has described the *Schwinn* decision as "an exercise in barren formalism," which is "artificial and unresponsive to the competitive needs of the real world." [69] And Bruce B. Wilson, then Deputy Assistant Attorney General, urged in congressional testimony on behalf of the Department of Justice that, although *Schwinn* termed all post-sale territorial restraints *per se* illegal, the opinion leaves "some room . . . for con-

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[67] *See* 537 F.2d at 988 n.13.

[68] *E.g.*, Posner, *supra* note 1; Robinson, *supra* note 46, at 270-81; Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?*, 44 Antitrust L.J. 537 (1975); Pollock, *The Schwinn Per Se Rule: The Case for Reconsideration*, 44 Antitrust L.J. 557 (1975); Phillips, *supra* note 3. *But see* Blecher, *Schwinn—An Example of a Genuine Commitment to Antitrust Law*, 44 Antitrust L.J. 550 (1975).

[69] Baker, *supra* note 68, at 537.

sideration of the economic exigencies of particular situations." [70]

C. *Schwinn's* Broad Language Ignores the Manufacturer's Legal Responsibilities to Consumers and its Need to Ensure Dealer Marketing Practices that Help the Manufacturer to Meet those Responsibilities.

The *Schwinn* majority declared broadly that,

> "If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale." [71]

That statement, based on the ancient doctrine of restraints on alienation, is far too sweeping to fit the modern marketing of complex consumer products through "sales" to dealers who in turn "sell" to consumers. The manufacturers of such products have, as we have shown, an obvious economic interest in maintaining consumer goodwill and discharging their legal obligations by assuring that consumers receive the pre- and post-sale services they need to choose and use the product successfully.

In a very real sense, these manufacturers do not transfer the entire "dominion" or "risk of loss" to the distributors or dealers who are their immediate vendees;

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[70] Hearings on Exclusive Territorial Franchise Act Before the Subcomm. on Commerce & Finance of the House Comm. on Interstate & Foreign Commerce, 93d Cong., 2d Sess. 17-18 (1974). That would also appear to be the view of at least one member of the *Schwinn* majority, who later indicated that *Schwinn* was really a rule-of-reason case. *See Albrecht* v. *Herald Co.*, 390 U.S. 145, 155-56 n.* (1968) (concurring opinion of Douglas, J.). *See also United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972) (vertical territorial restraints contrasted to *per se* unlawful horizontal restraints); *id.* at 617-18 (Burger, C.J., dissenting) (*Schwinn* described as rule-of-reason case).

[71] 388 U.S. at 379.

they continue to bear very substantial responsibilities for their products and a very substantial risk of loss throughout the entire period that their products are held by the dealer and the consumer.[72] They must be able to ensure that the retailers will follow practices that assist them in performing these tasks. Any requirements a manufacturer might impose with respect to a dealer's resale activities might be considered technically a "restraint on alienation." But many such requirements are obviously reasonable and necessary parts of a system of distribution through independent dealers.

A condition requiring the dealer to represent accurately the characteristics of the product, or to make it ready for sale as directed by the manufacturer, or to maintain adequate service facilities, or to help in recall and repair of defective items at the manufacturer's expense, is a "restriction" on the dealer's resale activities just as a location clause is. There are no differences between them that would justify testing the former type of condition under the rule of reason while banning location clauses *per se*. A location clause performs the essential function of assuring that reliable dealers will be present where and when needed to perform essential services that can only be done at the local level. That function differs in no relevant respect from the functions of many other requirements manufacturers must impose to ensure satisfaction of the consumer's needs and the manufacturer's duties. It is logically impossible to erect a *per se* fence between the reasonableness of such requirements and the claim of absolute illegality of a location clause.

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[72] *See* 388 U.S. at 392 (Stewart, J., concurring and dissenting).

D. Genuinely Vertical Territorial Conditions Should Be Judged Under the Rule of Reason.

This Court's decisions in *White Motor*, and in *Schwinn* itself, point the way back to a proper treatment of vertical restraints under the Sherman Act. As the Court said in *White Motor*, the judiciary's inexperience in dealing with vertical territorial restraints and the possibility that such restraints may have beneficial rather than anticompetitive effects favor the application of the rule of reason. This Court should renounce the artificial consignment/sale distinction, and the *Schwinn per se* rule based on it, and confirm that vertical restraints on the scope or focus of dealer marketing efforts will be judged under the rule of reason. So judged, such restraints will ordinarily be upheld, since the manufacturer will normally employ them to increase efficiency, competition, and consumer welfare.

As we have shown in Part I above, a manufacturer has no economic incentive to create monopoly conditions at the dealer or wholesaler level. On the contrary, the manufacturer has an interest in getting the product distributed in the most efficient and effective way possible, to make consumers as satisfied as possible with it. Any incentive the manufacturer may have to impose conditions on how its dealers resell arises from the need to ameliorate the circumstances that prevent a fragmented, uncoordinated distribution system from yielding efficient results. These conditions may have at most a *de minimis* effect on intrabrand competition, as with the motor vehicle industry's location clauses. Whatever their precise nature, they stem from the manufacturer's proper interest in a competitively effective dealer system that will efficiently meet consumer needs. Therefore, absent unusual circumstances that give a plausible reason to expect anticompetitive effects, genuinely *vertical* restraints imposed by a manufacturer on the scope or focus of dealer sales efforts should be upheld as reasonable.

The primary circumstance in which ostensibly vertical restraints may have significant anticompetitive effects is where the restraints actually result from a horizontal combination among dealers and have been imposed by them on the manufacturer.[73] Where territorial restrictions have "been induced solely or even primarily by [the] dealers and distributors, it would make no difference to their legality that the restrictions were formally imposed by the manufacturer rather than through inter-dealer agreement." *White Motor Co.* v. *United States*, 372 U.S. 253, 267 (1963) (Brennan, J., concurring). In such an instance, the limitations would properly be regarded as horizontal, and their legality would be determined accordingly. *See United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *cf. Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); *United States* v. *Masonite Corp.*, 316 U.S. 265, 275-76 (1942).

In reviewing ostensibly vertical restrictions, courts have been—and should be—alert to determine whether the dealers possess and have concertedly exercised such economic leverage over the manufacturer that they have been able to force the manufacturer to acquiesce in a horizontal combination that benefits the dealers *at the expense of the manufacturer and the consumer*. Obviously, that is less likely to be the case with restrictions on the scope or focus of dealer sales efforts, which clearly serve the manufacturer's and consumers' interest in effective distribution, than with, *e.g.*, minimum resale price maintenance programs, which plainly disserve the interests of many if not most consumers.[74]

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[73] *See, e.g.*, Posner, *supra* note 1, at 283, 287, 298-99.

[74] *See* note 1 *supra*. The possibility that apparently vertical resale price maintenance programs in fact stem from a combination among dealers may well have been a factor in the Court's consistently strong stand against minimum resale price maintenance under the Sherman Act. *See Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 407 (1911) ("[T]he advantage of established

We want to underscore that the mandate for a rule-of-reason approach to vertical marketing restraints is so clear that it exists independently of the manufacturers' size, market share or market power.[75] A manufacturer, with or without market power, has no interest in promoting monopoly profits for his dealers. Even if the manufacturer were a monopolist, its interests would be harmed, rather than helped, by the creation of a second monopoly at the dealer level.[76] As noted in Part I above, manufacturers may be presumed to select the most efficient, least costly means of distribution, for it is in their economic interest to do so. That is as true of a monopolist as of the smallest manufacturer.[77] In any event, these are issues the Court need not reach here.

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retail prices primarily concerns the dealers"); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 157-63 (1968) (Harlan, J., dissenting).

As Mr. Justice Brennan observed in *White Motor Co.* v. *United States*, 372 U.S. 253, 268 (1963), resale price maintenance also may "reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." (Emphasis in original.) Locational restrictions have no such effect.

[75] *See, e.g.*, Baker, *supra* note 68, at 545.

[76] "The difference between the price at which the manufacturer sells to the dealer and the dealer's price to the consumer is the manufacturer's cost of distribution, and any seller (even a monopolist) wants to minimize his costs." Posner, *supra* note 1, at 283. "There is reason to think that private firms have the incentive to minimize costs and to organize so as to avoid market failure so far as resource utilization is concerned, even when they possess monopoly power." Phillips, *supra* note 3, at 578.

[77] Indeed, since the primary (though improbable) anticompetitive danger is that ostensibly vertical restrictions may occasionally turn out to be horizontal restraints instigated by dealers and forced by them on the manufacturer, there is probably *less* necessity for antitrust scrutiny of marketing restrictions imposed by large and powerful manufacturers. Such manufacturers are less likely to be at the mercy of their dealers than weak or new manufacturers whose very existence depends on enticing a sufficient number of dealers to carry their goods.

Rather, vertical restrictions by a manufacturer on the scope or focus of its dealers' marketing efforts should be analyzed under the rule of reason—as such restrictions always were before *Schwinn*. Whether any decisive importance one way or the other should attach to the manufacturer's size, market share, or other single "talismanic" consideration will vary and will show itself soon enough in evaluating the reasonableness of some particular restraint in the particular distribution system in which it is used.

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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